Supreme Court, U.S.
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No. _____

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In The
Supreme Court of the United States

GRAY DAVIS, et al.,

Petitioners,

v.

CHARLES W. THOMPSON, and
STEPHEN L. BOGOVICH,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), this Court resolved a conflict among the circuit courts by holding that Congress failed to validly abrogate the states' Eleventh Amendment immunity under Title I of the Americans with Disabilities Act. But *Garrett* expressly declined to resolve the abrogation issue under Title II, resulting in the circuit courts' further splintering and adopting no fewer than six analytical models to resolve the question. The questions presented are:

1. Did Congress validly abrogate the States' Eleventh Amendment immunity from suit under Title II of the Americans with Disabilities Act?

2. Does the Americans with Disabilities Act apply to substantive aspects of a state's criminal-justice system, including life prisoner parole suitability determinations?

PARTIES TO THE PROCEEDING

Petitioners

The lead Petitioner in this action is Gray Davis, who is sued in his official capacity as the Governor of the State of California. The remaining Petitioners, also sued in their official capacities and identified by the names of the persons presently serving in those capacities, are Secretary Robert Presley of the State of California's Youth and Corrections Agency, Director Edward Alameida of the California Department of Corrections, and Chair Carol Daly of the Board of Prison Terms. Petitioners were defendants before the district court and appellees in the Ninth Circuit Court of Appeals.

Respondents

Respondents are Charles W. Thompson (California Department of Corrections No. C-39583) and Stephen L. Bogovich (California Department of Corrections No. C-89465), California prisoners serving indeterminate life terms. Respondents were plaintiffs in the District Court and appellants in the Ninth Circuit Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, led by Gray Davis, Governor of the State of California, respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's second amended opinion (App. A at 1-14a) is reported at 295 F.3d 890 (9th Cir. 2002). A prior published opinion in this action, *Bogovich v. Sandoval*, 189 F.3d 999 (9th Cir. 1999), and the superceded opinion from the appeal after remand, *Thompson v. Davis*, 282 F.3d 780 (9th Cir. 2002), are neither at issue nor attached. The unpublished District Court opinion (App. B at 15-38a) is *Thompson v. Davis*, CIV S 96-0297 GEB GGH P (E.D. Cal. Oct. 10, 2000).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on August 5, 2002. In an order dated August 8, 2002, the court issued its mandate, and affirmatively denied Petitioners an opportunity to file a petition for rehearing from the second amended opinion. (App. C at 39-43a.)

Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1). This Court also possesses independent authority to address Petitioners' assertion of Eleventh Amendment immunity. *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 467 (1945) ("The Eleventh

Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court.").

Petitioners' Eleventh Amendment challenge of the Americans with Disabilities Act, Title II, entitles the United States to intervene and present argument on the question of constitutionality. 28 U.S.C. § 2403(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. The Eleventh Amendment of the United States Constitution states:

> "The judicial power of the United States shall not be construed to extend to any suit in law or in equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

U.S. CONST. amend. XI, § 1.

B. The Fourteenth Amendment of the United States Constitution provides in pertinent part:

> "Section 1 . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. CONST. amend. XIV, § 1.

. . .

"Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."

U.S. CONST. amend. XIV, § 5.

C. Title II of the Americans with Disabilities Act of 1990 provides in pertinent part:

"The term 'public entity' means –
(A) any State or local government;
(B) any department, agency, special purpose district, or other instrumentality of a State. . . ."

42 U.S.C. § 12131.

". . . no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."

42 U.S.C. § 12132.

STATEMENT OF THE CASE

Respondents' civil complaint alleges that the State of California's Board of Prison Terms violates the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 *et seq.* (ADA), by following an "unwritten policy" to deny parole to substance-abusing and formerly substance-abusing life prisoners. Respondents affirmatively pleaded their extensive substance-abuse histories, their resulting criminal histories, and the connection between that substance

abuse and the murders that resulted in their indeterminate term life sentences. The District Court dismissed Respondents' original complaint, ruling that it should have been brought as a habeas corpus petition because it contests the continuing validity of the prisoners' confinement. Respondents appealed. The Ninth Circuit reversed, narrowing Respondents' claim to one seeking only prospective injunctive relief, and accordingly allowing the ADA claim to proceed.

On remand, Petitioners moved to dismiss the action on grounds including the ADA's inapplicability or limited applicability to the State of California's substantive criminal-justice decisions to grant parole. Petitioners also explicitly preserved their Eleventh Amendment immunity challenge in order that the District Court might be guided by this Court's then-pending *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001) decision. The District Court preserved Petitioners' right to the Eleventh Amendment challenge, but dismissed the action on the ground that Congress would not have extended the ADA's civil relief into the state's criminal-justice system without explicit directives. Such an application, the District Court held, would violate the purpose underlying the Tenth Amendment's reservation of police powers to the sovereign states.

Respondents appealed the second dismissal to the Ninth Circuit, which reversed in *Thompson v. Davis* (App. A at 1-14a) and twice amended its opinion following Petitioners' petitions for rehearing with suggestion for rehearing en banc from the original and first amended

opinions.[1] The original opinion held that Respondents could state an ADA claim based "primarily" upon an allegation of disability discrimination, and that under "the breadth of the statute's language, parole proceedings, including substantive decision making, constitute an activity of a public entity that falls within the ADA's reach." Petitioners challenged both components of the holding. The court did not publish regarding the Eleventh Amendment immunity issue.[2]

The first amended opinion omitted the "primarily" language[3] and maintained the court's expansive holding extending the ADA into substantive decision making, but also included a footnote granting the Board conditional discretion to consider substance abuse in determining parole suitability. (App. A at 2-3.) Petitioners then filed their petition for rehearing from the amended opinion. The *Thompson* Panel subsequently declared that petition improperly filed. However, the Panel also filed a second amended opinion, removing the term "substantive decision

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[1] The Ninth Circuit declined to file Petitioners' rehearing petition from the amended opinion, and prohibited either party from petitioning from the second amended opinion.

[2] The Ninth Circuit had already decided *sua sponte*, in a related case referencing *Garrett* and immediately preceding oral argument in *Thompson*, that the Eleventh Amendment did not bar prospective injunctive relief under Title II of the ADA. *Armstrong v. Davis*, 275 F.3d 849, 879 (9th Cir. 2001), *cert. denied*, ___ U.S. ___, 70 U.S.L.W. 3656, 71 U.S.L.W. 3207, 71 U.S.L.W. 3234 (Oct. 7, 2002).

[3] The distinction is key because "a plaintiff proceeding under Title II of the ADA must . . . prove that the exclusion from participation in the program was *solely* by reason of disability." *Weinreich v. Los Angeles County Metro. Transp. Auth.*, 114 F.3d 976, 978 (9th Cir.), *cert. denied*, 522 U.S. 971 (1997).

making" from the passage quoted *supra*, while retaining analogous terms throughout its discussion. (App. A at 14.) This petition for a writ of certiorari challenges both the Ninth Circuit's failure to respect *Garrett* and its unique extension of the ADA into substantive criminal-justice decision making.

REASONS FOR GRANTING THE WRIT

A writ of certiorari should be granted to resolve the split among circuit court opinions regarding (1) whether Congress validly abrogated the states' Eleventh Amendment sovereign immunity, in whole or in part, in Title II of the ADA; and (2) the necessarily related question of whether Eleventh Amendment immunity applies in actions seeking prospective injunctive relief in light of *Ex Parte Young*. Plenary review is necessary both to restore uniformity in the law governing abrogation, and to reconcile the six different approaches presently used by circuit courts to resolve Eleventh Amendment abrogation issues under Title II. Review would further resolve the conflict created by the Ninth Circuit's extending Title II to substantive criminal-justice matters. Each issue presents a question of exceptional importance and provides this Court with the timely opportunity to resolve long-standing issues of state sovereignty in our federal system.

I.

THE CIRCUITS ARE BADLY FRACTURED IN THEIR ANALYSES OF THE STATES' ELEVENTH AMENDMENT, SOVEREIGN IMMUNITY TO SUITS BROUGHT UNDER TITLE II OF THE AMERICANS WITH DISABILITIES ACT.

A. Circuit Courts of Appeals Presently Employ Six Different Abrogation Tests Purporting to Apply this Court's *Garrett* Decision to Title II of the ADA.

Four circuits presently rely on *Garrett* to hold that Congress failed to validly abrogate the states' sovereign immunity from suit. *Thompson v. State of Colo.*, 278 F.3d 1020, 1034 (10th Cir. 2001), *cert. denied*, ___ U.S. ___, 122 S.Ct. 1960 (2002); *Reickenbacker v. Foster*, 274 F.3d 974, 982-83 (5th Cir. 2001); *Walker v. Snyder*, 213 F.3d 344, 346-47 (7th Cir. 2000), *cert. denied sub nom. U.S. v. Snyder*, 531 U.S. 1190 (2001); *Alsbrook v. City of Maumelle, Ark.*, 184 F.3d 999, 1010 (8th Cir. 1999) (en banc), *cert. dismissed*, 529 U.S. 1001 (2000).[4] Only the Ninth Circuit stands diametrically opposed to this view, declining to conduct a *Garrett* analysis in favor of relying on its own pre-*Garrett* opinions upholding abrogation. *E.g.*, *Hason v. Med. Bd. of Cal.*, 279 F.3d 1167, 1171-72 (9th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3247 (Sep. 23,

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[4] Additionally, while the Eleventh Circuit has not yet resolved the question, both district courts publishing opinions within that circuit have held Congress' attempted abrogation to be invalid. *Association for Disabled Americans, Inc. v. Florida International University*, 178 F.Supp.2d 1291, 1293-94 (S.D. Fla. 2001); *Williamson v. Georgia Dept. of Human Resources*, 150 F.Supp.2d 1375, 1381 (S.D. Ga. 2001).

2002) (No. 02-479); *see Hason v. Med. Bd. of Cal.*, 294 F.3d 1166, 1168 (9th Cir. 2002) (O'Scannlain, J., dissenting to denial of petition for rehearing en banc).

Four additional circuit courts conduct an "as applied" approach to abrogation, requiring the states to litigate the substance of an action in order to establish their immunity from suit. In *Wessel v. Glendening*, ___ F.3d ___, 2002 WL 31121398, *8 (4th Cir. 2002), the court declined to review Title II abrogation, and instead directed a piecemeal approach, limiting its analysis to only the regulation or section at issue in any given case. *Garcia v. SUNY Health Scis. Ctr.*, 280 F.3d 98, 112 (2nd Cir. 2002) requires an individualized, factual determination of "discriminatory animus or ill will due to disability" in each case before resolving abrogation. *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808, 812-16 (6th Cir.) (en banc), *cert. denied*, ___ U.S. ___, 70 U.S.L.W. 3656, 71 U.S.L.W. 3205, 71 U.S.L.W. 3234 (Oct. 07, 2002), conducted an extensive legal analysis to hold abrogation invalid as to equal protection, but not due process, claims. *Kiman v. New Hampshire Dep't of Corrections*, 301 F.3d 13, 19 (1st Cir. 2002) (mandate stayed Sept. 24, 2002), requires a case-specific, "as applied" abrogation analysis that the court described as falling between the *Garcia* and *Popovich* models.

The split among the circuit courts results from misapplication of the *Garrett* decision. *Garrett* responded to the existent split in circuit court authorities by clarifying this Court's abrogation test as stated in *City of Boerne v. Flores*, 521 U.S. 507 (1997). *Garrett* established a tripartite analytical model: courts must first "identify with some precision the scope of the constitutional right at issue," then consider "whether Congress identified a history and

pattern of unconstitutional ... discrimination by the States," and finally determine whether the legislation is congruent and proportional to the identified wrong by being "responsive to or designed to prevent, unconstitutional behavior." *See generally Garrett*, 531 U.S. at 365-74.[5] To be sure, this Court limited *Garrett* to the ADA Title I context. *Id.* at 360 n. 1. However, the issue splintering circuit court authorities is not the *Garrett* conclusion, but instead a misapplication of the *Garrett* analytical model. *See, e.g., Hason*, 294 F.3d at 1168-69 (O'Scannlain, J., dissenting to denial of petition for rehearing en banc).

For example, the Ninth Circuit relies on its own pre-*Garrett* precedent recognizing "that the disabled are protected against discrimination by the Equal Protection Clause," that "Congress explicitly found that persons with disabilities suffered discrimination," and that the ADA was accordingly "within the scope of appropriate legislation" to vindicate the right. *Hason*, 294 F.3d at 1169-70. This misapplication of *Garrett* fails to discuss any specific discrimination by the states, and accordingly fails to analyze the breadth of ADA relief in relation to specific findings. *Id.* Nor could Congress' deficient record have supported such a *Garrett* analysis under the facts of this case. Despite identifying 43 million disabled Americans to

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[5] This analysis is additionally predicated on Congress' unequivocally expressing its intent to abrogate the states' immunity. However, *Garrett* resolved this issue. *Garrett*, 531 U.S. at 363-64. *Garrett* additionally resolved Congress' invocation of the Commerce Clause as a source of authority, by holding that "Congress may not ... base its abrogation of the states' Eleventh Amendment immunity upon the powers enumerated in Article I." *Id.* at 364. Petitioners challenge neither of these holdings.

be protected under the ADA, *Garrett*, 531 U.S. at 370, Congress failed to identify even a single instance of unconstitutional disability discrimination on the part of any state law-enforcement official. *Wessel*, 2002 WL 31121398 at *7.[6] Accordingly, the Ninth Circuit's approach is deficient both in its analytical process and in its result.

While the Ninth Circuit presents the most extreme example, Congress' deficient factual findings underlie the "as applied" analytical models presently used by four circuit courts. The Fourth Circuit's *Wessel* decision recognized that this deficiency resulted in an invalid attempt to abrogate immunity for the whole of Part A of Title II. *Wessel*, 2002 WL 31121398 at *2, 5-7. The Sixth Circuit's *Popovich* decision recognized that the deficient record precluded ADA enforcement of disabled rights arising under the Equal Protection Clause, but conducted no factual analysis in holding that the ADA may still enforce rights arising under the Due Process Clause. *Popovich*, 276 F.3d at 812-14. The Second Circuit recognized Congress' invalid abrogation attempt for Title II as a whole, but shifted the fact-finding burden to the courts by permitting a case by case determination of discriminatory state action. *Garcia*, 280 F.3d at 110-11. The First Circuit also recognized Congress' insufficient record, and also permitted courts to replace congressional records with their own case by case evaluation of alleged constitutional violations by the states. *Kiman*, 301 F.3d at 18, 23. These approaches

[6] In finding abrogation for Title I invalid, this Court relied on Congress identifying only "somewhere around 50" incidents of arguably unconstitutional state discrimination against the disabled in the employment context. *Garrett*, 531 U.S. at n. 7.

all suffer from the same deficiency: they recognize the deficient record underlying all ADA abrogation attempts, yet deny Eleventh Amendment immunity.

The *Garrett* analytical model should apply equally here, both to compel the Ninth Circuit to conduct the *Garrett* analysis, and to clarify that the fact-finding burden rested with Congress in enacting legislation rather than with the courts. *Garrett* analyzed Title I in this manner, and the same analytical model should apply to Title II. *See, e.g., Thompson*, 278 F.3d at 1028 n. 4. This Court's mandate that Congress identify a "history and pattern of unconstitutional ... discrimination by the States" cannot be viewed as license for courts to conduct their own factual analysis. Accordingly, Petitioners respectfully request that this Court grant their petition to correct the Ninth Circuit's error, and to resolve the badly fractured abrogation law resulting from misapplication of *Garrett* to Eleventh Amendment immunity claims under Title II of the ADA.

B. Circuit Courts of Appeals Are Split in their Application of the *Ex Parte Young* Doctrine for Prospective, Injunctive Relief Under Title II of the ADA.

Title II cases also create a need for resolution of the circuit courts' split in decisions addressing the *Ex Parte Young* exception to Eleventh Amendment immunity. 209 U.S. 123 (1908). The *Ex Parte Young* doctrine provides that the Eleventh Amendment does not bar suits for prospective injunctive relief brought against state officers in their official capacities to enjoin an alleged ongoing violation of federal law. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 269 (1997). In *Coeur d'Alene*, this Court reversed the

Ninth Circuit and reminded all circuit courts that a state retains core sovereign functions that permit it to "rely on its Eleventh Amendment immunity and to insist upon responding to these claims in its own courts, which are open to hear and determine the case." *Id.* at 288-89. The conflict created by the Ninth Circuit's extension of civil ADA Title II relief into an area of traditional state sovereignty – the enforcement of substantive criminal law, including the execution of sentences and parole – demands prompt resolution to prevent further, unwarranted application of the ADA to substantive criminal-justice decision making.

Ex Parte Young applies under two circumstances: the first is "where there is no state forum available to vindicate federal interests," and the second is "when the case calls for the interpretation of federal law." *Id.* at 270, 275. However, state courts are quite capable of enforcing federal rights, *id.* at 275-276, and may interpret the ADA, often in conjunction with their own, more protective laws prohibiting disability discrimination. *E.g.*, *Gatto v. County of Sonoma*, 98 Cal.App.4th 744, 758-59 (2002).[7] Accordingly, the traditional reasons for invoking the *Ex Parte Young* doctrine do not arise in the ADA context. However, this has not prevented the circuit courts, already divided in terms of Eleventh Amendment abrogation generally, from further splintering in applying the *Ex Parte Young* exception.

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[7] "It is worth noting that by the time that Congress enacted the ADA in 1990, every State in the Union had enacted such measures." *Garrett*, 531 U.S. at 368 n. 5.

The Fifth Circuit recently addressed the *Ex Parte Young* exception in *Reickenbacker v. Foster*, 274 F.3d 974, 976 (5th Cir. 2001), recognizing that the exception cannot apply when the state or its agency is the named defendant. The Seventh Circuit ruled similarly that plaintiffs cannot proceed against official-capacity defendants because *Ex Parte Young* permits only suits against individuals, rather than against state officials standing in for the state. *Walker v. Snyder*, 213 F.3d 344, 346-47 (7th Cir. 2000), *cert. denied sub nom. U.S. v. Snyder*, 531 U.S. 1190 (2001). But *Walker* brought this idea to its logical conclusion: because the ADA provides only for actions against the state, and because no proper defendant may be named as an individual to invoke *Ex Parte Young*, an ADA plaintiff seeking to compel state action "must pursue all of his ADA theories in state court." *Id.* at 347.

The Eighth Circuit, in a brief per curiam decision, permitted an *Ex Parte Young* exception to bring injunctive claims against a state departmental director. *Klinger v. Director, Dep't of Revenue*, 281 F.3d 776, 777 (8th Cir. 2002) (per curiam). *Klinger* did not discuss the capacity in which the state director was sued, or the paradox identified in *Walker*. Similarly, the Ninth Circuit has applied the *Ex Parte Young* exception without analysis. *Hason v. Med. Bd. of Cal.*, 279 F.3d 1167, 1171 (9th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3247 (Sept. 23, 2002). In *Garcia v. SUNY Health Scis. Ctr.*, 280 F.3d 98, 115 (2nd Cir. 2002) and *Thompson v. State of Colo.*, 278 F.3d 1020, 1034 (10th Cir. 2001), *cert. denied*, ___ U.S. ___, 122 S.Ct. 1960 (2002), the courts recognized this critical issue without resolving it.

While the division among the circuit courts provides significant incentive for review, a *Coeur d'Alene* analysis

under the facts of this case presents an additional issue: this Court's repeated recognition of the substantial deference owed to state sovereignty over criminal-justice and correctional systems. *See, e.g., Turner v. Safley*, 482 U.S. 78, 84-85 (1987). Notably, crime is "an offense against the sovereignty of the government," and each sovereign must play its role in resolving that offense against itself and its citizens. *See, e.g., Heath v. Alabama*, 474 U.S. 82, 88 (1985) (reviewing dual-sovereignty doctrine). Accordingly, the states are more than just geography, as addressed in *Coeur d'Alene*. They are also entities of their own sovereign law. In order to resolve both the division between the circuit courts, and the unsettled question of the states' sovereignty over substantive criminal-justice matters in the *Ex Parte Young* context, this petition should be granted.

C. The Ninth Circuit's Unique Extension of the ADA to Substantive Criminal-Justice Decision Making Creates a Conflict with All Other Circuit Courts Addressing this Issue.

The Ninth Circuit's *Thompson* decision uniquely applies Title II of the ADA to a substantive criminal-justice context, and creates an unwarranted split between the circuit courts of Appeals. For example, *Rosen v. Montgomery County Maryland*, 121 F.3d 154, 155-56 (4th Cir. 1997) held that a drunk driving arrest was not a "program" or "activity" within the meaning of the ADA. Similarly, in *Hainze v. Richards*, 207 F.3d 795, 797, 801-02 (5th Cir.), *cert. denied*, 531 U.S. 959 (2000), the Fifth Circuit held that Title II does not govern law enforcement's "on-the-street responses" to a disabled person's actions, and

distinguished operational details such as "handling and transporting" a disabled person from the officers' substantive decisions to use force. The Seventh Circuit, in *Bryant v. Madigan*, 84 F.3d 246, 249 (7th Cir. 1996) also held that "incarceration . . . is not a 'program' or 'activity'" covered by the ADA, and that Congress intended no "end run" around the Eighth Amendment with the statute.

In *Gohier v. Enright*, 186 F.3d 1216, 1220-22 (10th Cir. 1999), the case upon which *Thompson* most relies, the Tenth Circuit recognized that the ADA permits only two theories in a criminal-justice context: (1) where untrained officers mistake disability for criminal conduct (*e.g.* slurred speech from a stroke being mistaken for drunkenness), and (2) where officers fail to accommodate disability in the mechanics of making an arrest (*e.g.* by transporting a disabled person in a police vehicle unequipped to transport that person safely). *Gohier*, however, held that allegations of police shooting and killing a disabled man with a knife, who was wielding the knife because of his disability, stated no ADA claim. *Id.* at 1222. Accordingly, *Gohier* is consistent with the position that Title II applies to operational details such as training and transportation, but not to substantive matters such as decisions to arrest or parole.

The Ninth Circuit's extension of ADA relief into substantive criminal matters also conflicts in principle with this Court's existing Eighth Amendment jurisprudence. In *Atkins v. Virginia*, ___ U.S. ___, 122 S.Ct. 2242 (2002), this Court held that executing the insane violated the Eighth Amendment because states' application of their own laws created a consensus opposing the practice. *Atkins* further stated that federal courts should "leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon its execution of

sentences." *Atkins*, 122 S.Ct. at 2250. *Atkins* relied upon *Robinson v. Cal.*, 370 U.S. 660, 666-67 (1962), and its holding that the Eighth Amendment prohibits even a short period of incarceration for "the 'status' of narcotic addiction." *Atkins*, 122 S.Ct. at 2247. *Robinson* recognized the difference between the illness "which may be contracted innocently or involuntarily," and the criminal activity that results from the illness. *Robinson*, 370 U.S. at 666-67. The states cannot freely develop their own consensus as to executing criminal sentences if the Ninth Circuit is permitted to dictate the substance of that development through its interpretation of the ADA's civil relief scheme.

The Ninth Circuit's unique application of civil ADA relief to substantive criminal-justice matters extends a long shadow over state sovereignty. The *Thompson* holding extends civil relief to parole suitability determinations, while the court's misapplication of *Gohier* applies ADA relief to the decision to arrest. Other courts have considered ADA relief in the context of substantive defenses in criminal trials, such as whether a state must permit an insanity defense. *Despears v. Milwaukee County*, 63 F.3d 635, 637 (7th Cir. 1995). In order to both resolve the division between the circuit courts, and reconcile ADA relief with this Court's decisions in *Atkins* and *Robinson*, Petitioners respectfully request that this Court grant their petition.

II.

THIS CASE PRESENTS IMPORTANT QUESTIONS OF STATE SOVEREIGN IMMUNITY TO SUIT AND TRADITIONAL STATE SOVEREIGNTY TO ENFORCE SUBSTANTIVE CRIMINAL LAW.

The questions presented in this petition address fundamental issues of federalism: the state's sovereign immunity from suit, and authority to punish offenses against the state through enforcing its own criminal laws. As *Coeur d'Alene* establishes, these core issues of sovereignty stand inseparable from any analysis of Eleventh Amendment abrogation and the *Ex Parte Young* exception for prospective injunctive relief. Reconciliation of the badly fractured circuit court authorities is necessary to enforce traditional boundaries in our federal system.

This Court has long recognized the states' sovereign authority over substantive criminal-justice matters. In but one example, this Court held in *Knapp v. Schweitzer*, 357 U.S. 371, 375 (1958), *overruled in part on other grounds by Murphy v. Waterfront Commission of N.Y. Harbor*, 378 U.S. 52 (1968):

> Except insofar as penal remedies may be provided by Congress under the explicit authority to "make all Laws which shall be necessary and proper for carrying into Execution" the other powers granted by Art. I, § 8, the bulk of authority to legislate on what may be compendiously described as criminal justice, which in other nations belongs to the central government, is under our system the responsibility of the individual States.

While an important decision, *Knapp* broke no new ground, and instead relied on the time-honored words of James Madison and Chief Justice Marshall to defend state sovereignty over criminal matters. *Id.* at 377 and nn.2-4. The district court in *Thompson* invoked *Knapp* for this proposition. (App. B at 32a.) The Ninth Circuit, unique among the circuit courts, disregarded *Knapp*'s teachings without comment or analysis.

This petition provides this Court with a timely opportunity to reassert its opinions confirming state sovereignty over criminal-justice matters. This presents a particularly important question in light of *Knapp*'s Article I exception being barred by *Garrett*, insofar as this Court held that the ADA could not be enacted pursuant to Congress' Article I authority. *Garrett*, 531 U.S. at 364.

This Court has further taught that the sovereign states, not the federal government, provide the appropriate forums for addressing societal change as it applies to criminal-justice, including moral changes such as how society views the disabled. *Powell v. State of Tex.*, 392 U.S. 514, 536 (1968). In *Powell*, this Court declined to constitutionalize the insanity defense. *Id.* Earlier this year, this Court reaffirmed state sovereignty over these issues in holding that federal courts should "leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences." *Atkins*, 122 S.Ct. at 2250. While *Atkins* prohibited states from executing mentally retarded prisoners, this Court reached its conclusion based upon a consensus of the states' existing practices. *Id.* at 2248-49. The ADA, in contrast, relies on Congress' establishing an affirmative record of unconstitutional state discrimination against the disabled. *See generally Garrett*, 531 U.S. at 365-74. Our

federal system cannot both retain state sovereignty over these matters, as this Court has repeatedly held, and simultaneously permit federal law to dictate results as required by the Ninth Circuit through the ADA.

This Court's repeated recognition of substantive criminal-justice matters as core state functions further applies to the *Ex Parte Young* question. Pursuant to a *Coeur d'Alene* analysis, no Eleventh Amendment exception would apply, and the states would be entitled to trial in their own courts when their criminal-justice systems face legal challenges. This matter, and Congress' attempt to abrogate the states' Eleventh Amendment immunity for Title II generally, remain open and important questions awaiting resolution by this Court. Petitioners respectfully request that this Court grant their petition to resolve these interrelated and important questions of state sovereignty.

CONCLUSION

Petitioners respectfully request that this Court grant their petition for a writ of certiorari in order to resolve these important and divisive issues.

Respectfully submitted,

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APPENDIX A

295 F.3d 890

United States Court of Appeals,
Ninth Circuit.

Charles W. THOMPSON; Stephen Bogovich,
Plaintiffs-Appellants,
v.
Gray DAVIS, Governor State of California;
Joseph Sandoval, Secretary of Youth
and Corrections Agency; James Gomez,
Director of the Dept. of Corrections;
John W. Gillis, Commissioner of the Board of Prison
Terms; James W. Nielsen,
Chairman of the Board of Prison Terms,
Defendants-Appellees.

No. 01-15091.

Argued and Submitted Dec. 3, 2001.
Filed March 8, 2002.
Amended July 3, 2002.
Second Amendment Aug. 5, 2002.

Sara Norman, San Quentin, CA, for the plaintiffs-appellants.

John M. Appelbaum and Michael J. Williams, Sacramento, CA, for the defendants-appellees.

Appeal from the United States District Court for the Eastern District of California; Garland E. Burrell, District Judge, Presiding. D.C. No. CV-96-00297-GEB(GGH).

Before: BRIGHT,* B. FLETCHER, and FISHER, Circuit Judges.

ORDER AND AMENDED OPINION

PER CURIAM.

ORDER

The opinion of this court filed March 8, 2002, 282 F.3d 780, slip op. at 3859, is amended as follows:

On page 3863 of the slip opinion, add the following sentence to the end of the first full paragraph: "The plaintiffs' claim that the state parole board is categorically denying inmates consideration for parole because of their disability, drug addiction, survives the Defendants' Rule 12(b)(6) motion."

On page 3863 of the slip opinion, in the last paragraph delete "primarily due to" and replace with "because of." On page 3869 of the slip opinion, in the paragraph starting with "Another flaw in the district court's reasoning . . . ," delete "to determine parole release" and replace with "in the parole context." In the same paragraph, add "long" after "For example, circuit courts have." Delete "race is an impermissible criterion in the parole decision-making process" and replace with "parole boards may not exclude an inmate for consideration for parole based on race."

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* The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

Change "same constitutional promises" to "similar constitutional promises."

On page 3870 of the slip opinion, in the first full paragraph, change the first sentence to read (and add new footnote 4): "The same holds true in the parole context: since a parole board may not categorically exclude African-Americans from consideration for parole because of their race, and since Congress thinks that discriminating against a disabled person is like discriminating against an African-American, the parole board may not categorically exclude a class of disabled people from consideration for parole because of their disabilities.[4]"

---

[4] Of course the practical operation of considerations of race and disability in the parole context will be different. Considerations of race, subject to the strictest scrutiny under the Constitution, are impermissible in parole decisions in part because that factor cannot be relevant to the assessment of a person's future dangerousness. Title II does not categorically bar a state parole board from making an individualized assessment of the future dangerousness of an inmate by taking into account the inmate's disability. Title II only prohibits discrimination against "qualified" people with disabilities. 42 U.S.C. § 12131 (defining a qualified person with a disability as a person who "meets the essential eligibility requirements for the receipt of services"). A person's disability that leads one to a propensity to commit crime may certainly be relevant in assessing whether that individual is qualified for parole. In addition, the parole board might show that legitimate penological interests justify consideration of an inmate's disability status beyond that appropriate in other settings. *See Gates v. Rowland,* 39 F.3d 1439, 1447 (9th Cir.1994). The parole board claims to have and undeniably does have legitimate penological interests in considering the plaintiffs' substance abuse backgrounds during the individualized inquiry for parole suitability. We hold only that plaintiffs may state a claim under Title II based on their allegations that the parole board failed to perform an individualized assessment of the threat they pose to the community by categorically excluding from consideration for parole all people with substance abuse histories.

On page 3871, in the last line of the opinion add "AND REMANDED" after "REVERSED."

OPINION

Charles W. Thompson and Stephen L. Bogovich (collectively, "Plaintiffs"), two California state prisoners, seek prospective injunctive relief against various state officials who have a role in the parole process. For convenience we refer to them as "Defendants." Plaintiffs allege that Defendants have violated Title II of the Americans with Disabilities Act ("ADA") by denying them full and fair consideration for parole based on their disability of drug addiction. The district court dismissed the complaint for failure to state a claim on the ground that the ADA does not apply to the substantive decision-making process of parole proceedings. Because we conclude that there is no categorical rule excluding parole decisions from the scope of the ADA, we reverse the ruling of the district court and remand for further proceedings. The plaintiffs' claim that the state parole board is categorically denying inmates consideration for parole because of their disability, drug addiction, survives the Defendants' Rule 12(b)(6) motion.

I.

Factual and Procedural Background

Plaintiffs are state prisoners who are serving terms of fifteen years to life for second-degree murder. According to their complaint, Plaintiffs have a history of drug addiction, which substantially limited their judgment, ability to learn, ability to comprehend the long-range effects of their acts, and ability to maintain stable social relationships and stable employment. Both received treatment for

substance abuse while in prison and have been drug-free since 1990 and 1984, respectively. Both became statutorily eligible for parole in 1993 and assert that they have been denied parole release dates because of their substance abuse histories.

Plaintiffs, without the benefit of counsel,[2] filed this action in federal court. Plaintiffs assert that the Board of Prison Terms ("Board"), the state parole authority, follows an unwritten policy of automatically denying parole to prisoners with substance abuse histories in violation of Title II of the ADA. Specifically, the *pro se* complaint alleges that the Board refused to set a parole release date for Plaintiffs because of their records of drug addiction and/or because the Board regarded them as drug addicts. The complaint further alleges that the Board denied Plaintiffs an individualized assessment of their future dangerousness because of their disability. Plaintiffs seek only prospective injunctive relief from Defendants in their official capacities.

A magistrate judge initially decided that, because the complaint alleges that Plaintiffs were improperly denied parole, their claims might affect their release from prison, and they could proceed only by writ of habeas corpus. The district court dismissed the case on the magistrate judge's recommendation, but this court reversed on appeal, holding that Plaintiffs' ADA claim "does not necessarily imply the invalidity of their continuing confinement." *See Bogovich v. Sandoval,* 189 F.3d 999, 1004 (9th Cir.1999).

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[2] Plaintiffs appeared *pro se* throughout the district court proceedings but are now represented by counsel.

On remand, Defendants filed a Rule 12(b)(1) motion to dismiss, which the magistrate judge interpreted as a Rule 12(b)(6) motion because Rule 12(b)(1) was inapplicable. The magistrate judge concluded that a Rule 12(b)(6) dismissal was not warranted on the grounds stated by Defendants. Instead, *sua sponte,* the magistrate judge decided that the complaint should be dismissed because "[t]he ADA does not apply to the substantive decision making process in the criminal law context." The district court adopted the magistrate judge's findings and recommendations and dismissed the case. Plaintiffs appeal. We have jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

II.

Standard of Review

The district court's dismissal of the complaint under Rule 12(b)(6) is reviewed *de novo. Zimmerman v. City of Oakland,* 255 F.3d 734, 737 (9th Cir.2001). All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Sprewell v. Golden State Warriors,* 266 F.3d 979, 988 (9th t [sic] Cir.2001). A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief. *Id.* In addition, we construe *pro se* pleadings liberally on a defendant's motion to dismiss for failure to state a claim. *Ortez v. Washington County Oregon,* 88 F.3d 804, 807 (9th Cir.1996).

III.

Discussion

A. *ADA Framework*

Title II of the ADA prohibits a public entity from discriminating against a qualified individual with a disability on the basis of disability. 42 U.S.C. § 12132 (1994); *Weinreich v. L.A. County Metro. Transp. Auth.*, 114 F.3d 976, 978 (9th Cir.1997). To state a claim of disability discrimination under Title II, the plaintiff must allege four elements: (1) the plaintiff is an individual with a disability; (2) the plaintiff is otherwise qualified to participate in or receive the benefit of some public entity's services, programs, or activities; (3) the plaintiff was either excluded from participation in or denied the benefits of the public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (4) such exclusion, denial of benefits, or discrimination was by reason of the plaintiff's disability. *Weinreich*, 114 F.3d at 978.

With respect to the first element, the ADA defines "disability" as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2) (1994). Here, Plaintiffs allege that they are disabled based on subsections (B) and (C) – that is, they have a record of drug addiction and/or are regarded as being drug addicts by the Board.

Drug addiction that substantially limits one or more major life activities is a recognized disability under the ADA. 28 C.F.R. § 35.104 (2000) ("The phrase *physical or mental impairment* includes ... drug addiction.... "). While the term "qualified individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, the ADA does protect individuals who have successfully completed or are participating in a supervised drug rehabilitation program and are no longer using illegal drugs, as well as individuals who are erroneously regarded as using drugs when they are not. *See* 42 U.S.C. § 12210(a) & (b) (1994); *Collings v. Longview Fibre Co.*, 63 F.3d 828, 831-32 (9th Cir.1995) (acknowledging an analogous provision in Title I). Plaintiffs allege that they have been rehabilitated and no longer use drugs. They also allege that their past drug addiction substantially limited certain major life activities, including their ability to learn and work. *See* 29 C.F.R. § 1630.2(i) (2000). Since Plaintiffs allege that they have a record of a substantially limiting impairment and that they are regarded by the Board as having a substantially limiting impairment, under § 12102(2)(B) and (C), they have pled that they are disabled within the meaning of the ADA.

With respect to the second element of disability discrimination, Plaintiffs allege that they are statutorily eligible for parole. As a result, Plaintiffs have pled that they are otherwise qualified for the public benefit they seek, consideration for parole.

With respect to the third and fourth elements, Plaintiffs allege that they have been denied the benefit of a public program or activity – consideration for parole – by reason of their disability. Below, we examine whether parole hearings are public programs or activities covered

by the ADA. Because we conclude that they are, Plaintiffs' allegations are sufficient to state a Title II claim.[3]

B. Applicability of the ADA to Parole Decisions

The district court determined that the ADA does not apply to parole decisions because it does not extend "to the substantive decision making process in the criminal law context." We find no basis for concluding that Title II of the ADA contains such a broad exception.

Although the power to fashion and enforce criminal laws is reserved primarily to the States, many functions traditionally reserved to the states are subject to the ADA, including quarantine laws and, significantly, prison administration. *Armstrong v. Wilson,* 124 F.3d 1019, 1024-25 (9th Cir.1997) [hereinafter *Armstrong I*]. The Supreme Court recently affirmed our holding that the ADA applies to prisons in *Pennsylvania Dep't of Corrections v. Yeskey,* 524 U.S. 206, 118 S.Ct. 1952, 141 L.Ed.2d 215 (1998).

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[3] Defendants argue that Thompson pled himself out of this case by attaching a copy of a 1999 Board decision to his Opposition to Defendants' Motion to Dismiss, and the decision does not rely on Thompson's history of substance abuse. We reject this argument, first, because we generally are confined to the pleadings when reviewing a 12(b)(6) motion to dismiss. *See In re Am. Cont'l Corp./Lincoln Sav. & Loan Sec. Litig.,* 102 F.3d 1524, 1537 (9th Cir.1996) ("In general, material outside the pleadings cannot be considered in ruling on a motion to dismiss, unless the motion is treated as one for summary judgment and the parties are 'given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.' "). Second, while the 1999 Board decision does not disclose the Board's reliance on Thompson's history of substance abuse, the decision does not affirmatively prove that the Board did not act on an unwritten policy to deny all former substance abusers parole.

Nonetheless, Defendants argue that the courts have applied the ADA only to logistical matters of prison administration, including access to parole hearings, but not to substantive decision-making processes. *See Armstrong I,* 124 F.3d at 1025, and *Armstrong v. Davis,* 275 F.3d 849, 856 (9th Cir.2001) [hereinafter *Armstrong II*] (collectively holding that the ADA requires reasonable accommodations to give disabled prisoners access to parole hearings). We are not convinced that a per se rule immunizing the States' substantive decision-making processes is consistent with the language of the ADA as interpreted in case law and agency law.

First, case law indicates that the ADA applies in contexts that involve substantive criminal law decisions. For example, the Tenth Circuit has held that the ADA applies to arrests, which involve substantive decision making. *Gohier v. Enright,* 186 F.3d 1216, 1221 (10th Cir.1999) ("[A] broad rule categorically excluding arrests from the scope of Title II . . . is not the law."). Likewise, the EEOC guidelines state that, under the ADA regulations, law enforcement is obligated to modify "policies that result in discriminatory arrests or abuse of individuals with disabilities." 28 C.F.R. Pt. 35, App. A § 35.130 (2000).

On the other hand, the Fourth Circuit, in *Rosen v. Montgomery County Maryland,* has indicated that arrests do not come within the ADA's ambit. 121 F.3d 154 (4th Cir.1997). However, the *Rosen* decision was not based upon a concern that the ADA would impermissibly interfere with the substantive decisions involved in arrests. Rather, reasoning that the statutory text implied voluntariness on the part of the individual, it held that an arrest was not a "program or activity" of the defendant County. *Id.* at 157-58. This reasoning has now been discredited by the

Supreme Court. *Yeskey,* 524 U.S. at 211, 118 S.Ct. 1952 ("[T]he words [of § 12132] do not connote voluntariness.").

The Ninth Circuit has not addressed the question of whether the ADA applies to arrests. However, the weight of authority on the applicability of the ADA to arrests suggests that a state's substantive decision-making processes in the criminal law context are not immune from the anti-discrimination guarantees of federal statutory law.

Another flaw in the district court's reasoning is its failure to recognize that state powers in the parole context are already curtailed by federal anti-discrimination guarantees. For example, circuit courts have long held that parole boards may not exclude an inmate from consideration for parole based on race. *See, e.g., White v. Bond,* 720 F.2d 1002, 1003 (8th Cir.1983); *Candelaria v. Griffin,* 641 F.2d 868, 870 (10th Cir.1981). Although these cases of racial discrimination were based directly on constitutional violations while this case is based on a violation of the ADA, Congress passed the ADA to enforce similar constitutional promises of equal protection. This court has noted:

> "If a prison may not exclude blacks from the prison dining hall and force them to eat in their cells, and if Congress thinks that discriminating against a blind person is like discriminating against a black person," the prison may not exclude the blind person from the dining hall unless allowing him access would unduly burden prison administration.

Armstrong I, 124 F.3d at 1025 (quoting *Crawford v. Indiana Dep't of Corrections,* 115 F.3d 481, 486 (7th Cir.1997)).

Concluding that Congress did in fact liken disability discrimination to racial discrimination, we held that the ADA applies to state correctional systems. *Id.*

The same holds true in the parole context: since a parole board may not categorically exclude African-Americans from consideration for parole because of their race, and since Congress thinks that discriminating against a disabled person is like discriminating against an African-American, the parole board may not categorically exclude a class of disabled people from consideration for parole because of their disabilities.[4] The fact that considering a prisoner for parole is a substantive, criminal law

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[4] Of course the practical operation of considerations of race and disability in the parole context will be different. Considerations of race, subject to the strictest scrutiny under the Constitution, are impermissible in parole decisions in part because that factor cannot be relevant to the assessment of a person's future dangerousness. Title II does not categorically bar a state parole board from making an individualized assessment of the future dangerousness of an inmate by taking into account the inmate's disability. Title II only prohibits discrimination against "qualified" people with disabilities. 42 U.S.C. § 12131 (defining a qualified person with a disability as a person who "meets the essential eligibility requirements for the receipt of services"). A person's disability that leads one to a propensity to commit crime may certainly be relevant in assessing whether that individual is qualified for parole. In addition, the parole board might show that legitimate penological interests justify consideration of an inmate's disability status beyond that appropriate in other settings. *See Gates v. Rowland,* 39 F.3d 1439, 1447 (9th Cir.1994). The parole board claims to have and undeniably does have legitimate penological interests in considering the plaintiffs' substance abuse backgrounds during the individualized inquiry for parole suitability. We hold only that plaintiffs may state a claim under Title II based on their allegations that the parole board failed to perform an individualized assessment of the threat they pose to the community by categorically excluding from consideration for parole all people with substance abuse histories.

decision does not license the decision-maker to discriminate on impermissible grounds.

Finally, the plain language of the ADA extends its anti-discrimination guarantees to the parole context. Title II of the ADA provides:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. Like state prisons, state parole boards "fall squarely within the statutory definition of 'public entity,' which includes 'any department, agency, special purpose district, or other instrumentality of a State or States or local government.'" *Yeskey,* 118 S.Ct. at 1954-55 (quoting 42 U.S.C. § 12131(1)(B)).

Plaintiffs contend that the Board has denied them the benefit of full and fair consideration for parole by reason of their disability. We have found that prison "programs or activities" include such things as parole and disciplinary hearings. *See Armstrong I,* 124 F.3d at 1024, and *Armstrong II,* 275 F.3d at 856 (collectively making clear that parole proceedings are "programs or activities" within the meaning of the ADA); *Duffy v. Riveland,* 98 F.3d 447, 455 (9th Cir.1996) (holding the same with respect to prison disciplinary hearings); *Bonner v. Lewis,* 857 F.2d 559, 562 (9th Cir.1988) (same). In addition, we have interpreted Title II's "programs" and "activities" to include " 'all of the operations of' a qualifying local government." *Bay Area Addiction Research and Treatment, Inc. v. City of Antioch,*

179 F.3d 725, 731 (9th Cir.1999). In reaching this conclusion, we noted that the legislative history of the ADA "strongly suggests that § 12132 should not be construed to allow the creation of spheres in which public entities may discriminate on the basis of an individual's disability." *Id.* Indeed, we found that Congress specifically rejected an approach that could have left room for exceptions to § 12132's prohibition on discrimination by public entities. *Id.* at 732. Given the breadth of the statute's language, parole proceedings constitute an activity of a public entity that falls within the ADA's reach.

IV.

Conclusion

We conclude that the district court erred in dismissing Plaintiffs' claims on the ground recommended by the magistrate judge. In the words of the Tenth Circuit, we hold only that "a broad rule categorically excluding" parole decisions "from the scope of Title II is not the law." *Gohier,* 186 F.3d at 1221. Because this case comes to us on a *sua sponte* pleading ruling, we decline to express an opinion on the merits of Plaintiffs' claims without further record development.

REVERSED and REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

CHARLES W. THOMPSON, et al.,

Plaintiffs,

vs.

GREY DAVIS, et al.,

Defendants.[1]

/

No. CIV S-96-0297 GEB GGH PO

ORDER AND FINDINGS & RECOMMENDATIONS

(Filed Oct. 10, 2000)

I. Introduction

Plaintiffs are state prisoners proceeding pro se with an action filed pursuant to the American With Disabilities Act (ADA). Plaintiffs allege that defendants' consideration of their substance abuse history when making parole decisions violates the ADA. On July 19, 1996, the court found that plaintiffs' claim affected their release from prison so that their sole federal remedy was a writ of habeas corpus. The court stayed this action pending plaintiffs' exhaustion of state court remedies. On September 23, 1999, the Ninth Circuit Court of Appeals reversed this order and remanded for further proceedings, finding that plaintiffs were not required to raise their claim in a

[1] The present Governor of California and Director of Corrections were substituted for their predecessors in this official capacity action.

habeas petition. *Bogovich v. Sandoval*, 189 F.3d 999 (9th Cir. 1999).[2]

Pending before the court is defendants' motion to dismiss. After carefully reviewing the record, the court recommends that defendants' motion be granted on the grounds that the ADA does not apply to the substantive decision making process in a criminal law context.

II. Motion for More Definite Statement

On March 23, 2000, defendants filed a memorandum of points and authorities in support of the motion to dismiss. On March 21, 2000, plaintiffs filed a motion for a more definite statement. Plaintiffs state that defendants did not identify the authority upon which their motion was made. On March 22, 2000, defendants filed a motion to dismiss and memorandum in support of the motion, identifying the authority for their motion as Fed. R. Civ. P. 12(b)(1) (caption), and Rule 12 generally (text). On that date defendants also filed a statement of non-opposition to plaintiffs' motion for a more definite statement.

Defendants' attempted clarification raises as many doubts as the initial notice of motion. Fed. R. Civ. P. 12(b)(1) applies to motions which challenge the subject matter jurisdiction of the court. Defendants' motion does not make this challenge. Defendants' motion does attack the complaint for failure to state a claim on several grounds applicable to "wrong" parties and claims. Because

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[2] The Ninth Circuit expressed no opinion regarding the merits of plaintiffs' claim.

plaintiffs have been able to understand the substantive issues in this case, they have not been prejudiced, and the court will review the motion under Fed. R. Civ. P. 12(b)(6).

III. Legal Standards for Motion to Dismiss

A complaint should not be dismissed under Rule 12(b)(6) unless it appears beyond doubt that plaintiff cannot prove any set of facts consistent with his allegations which would entitle him to relief. *NOW, Inc. v. Schiedler* [sic], 510 U.S. 249, 256, 114 S. Ct. 798, 803 (1994); *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232 (1984), *citing Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101 (1957), *Cervantes v. City of San Diego*, 5 F.3d 1273, 1274-75 (9th Cir. 1993). Dismissal of the complaint, or any claim within it, "can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990); *see also Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984).

In considering a motion to dismiss, the court must accept as true the allegations of the complaint in question, *Hospital Bldg. Co. v. Rex Hospital Trustees*, 425 U.S. 738, 740, 96 S. Ct. 1848, 1850 (1976), construe the pleading in the light most favorable to the party opposing the motion and resolve all doubts in the pleader's favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421, 89 S. Ct. 1843, 1849, *reh'g denied*, 396 U.S. 869, 90 S. Ct. 35 (1969). The court will "'presume that general allegations embrace those specific facts that are necessary to support the claim.'" *NOW*, 510 U.S. at 256, 114 S. Ct. at 803; *quoting Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 2137 (1992).

Moreover, pro se pleadings are held to a less stringent standard than those drafted by lawyers. *Haines v. Kerner*, 404 U.S. 519, 520, 92 S. Ct. 594, 596 (1972).

The court may consider facts established by exhibits attached to the complaint. *Durning v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987). The court may also consider facts which may be judicially noticed, *Mullis v. United States Bankruptcy Ct.*, 828 F.2d 1385, 1388 (9th Cir. 1987); and matters of public record, including pleadings, orders, and other papers filed with the court, *Mack v. South Bay Beer Distributors*, 798 F.2d 1279, 1282 (9th Cir. 1986). The court need not accept legal conclusions "cast in the form of factual allegations." *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

A pro se litigant is entitled to notice of the deficiencies in the complaint and an opportunity to amend, unless the complaint's deficiencies could not be cured by amendment. *See Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987).

IV. Discussion

This court adopts the statement of facts/issues contained in the opinion of the Ninth Circuit:

> Stephen Bogovich and Charles Thompson are state prisoners who are serving terms of fifteen years to life for second-degree murder. Both received treatment for substance abuse while in prison and have been drug-free since 1984 and 1990, respectively. Both became statutorily eligible for parole in 1993 and both assert that they have been denied a parole release date primarily due to their history of substance abuse. Appellant's filed this action in federal court against the

> Board, asserting that their policy of considering a prisoner's substance abuse history when making parole decisions violates Title II of the ADA. Appellants' complaint sought prospective injunctive relief only. Specifically, the remedy sought was a prohibition against the Board "[c]ontinuing to deny plaintiffs a parole release date primarily because of their substance abuse disabilities."

Bogovich, 189 F.3d at 1001.

Title II of the ADA provides, "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

A qualified individual with a disability under Title II is defined as follows:

> The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal or architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12131(2).

The prohibitions of the ADA apply to state prisons. *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 118 S.Ct. 1952, 1954 (1998).

Defendants move to dismiss on four grounds: 1) no proper defendant named; 2) res judicata bars plaintiff

Thompson's claim; 3) rehabilitated substance abusers are not disabled within the meaning of the ADA; 4) legitimate penological interests mandate consideration of past substance abuse.

A. Proper Defendants

This action is proceeding on the original complaint filed February 14, 1996. On January 12, 2000, the court ordered service of defendants Governor of California, Secretary of Youth and Corrections Agency, Director of California Department of Corrections, Chairman of the Board of Prison Terms and the Commissioner of the Board of Prison Terms. All defendants are named in their official capacities only.

Title II of the ADA prohibits discrimination in programs of a "public entity." 42 U.S. § 12132. Defendants argue that individual defendants do not meet the statutory definition because they are not "entities." In support of this argument, defendants cite the following cases: *Yeskey v. Pennsylvania*, 76 F.Supp.2d 572, 5470-575 [sic] (M.D. Pa. 1999) (citing *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1005 n. 8) (8th Cir. 1999); *Montez v. Romer*, 32 F.Supp.2d 1235, 1240 (D.Colo. 1999); *Baird v. Rose*, 192 F.3d 462, 470 (4th Cir. 1999); *Coddington v. Adelphi University*, 45 F.Supp.2d 211, 217 (E.D.N.Y. 1999); *Campos v. San Francisco State Univ.*, No. C-97-2326 MMC, 1999 WL 1201809 at *10 (N.D.Cal. 1994).

The cases cited by defendants stand for the proposition that defendants may not be sued under Title II in their individual capacities. Citing *Alsbrook*, the District Court in *Yeskey*, held that individual defendants are not liable under Title II of the ADA. *Yeskey*, 76 F.Supp.2d at

575. In *Alsbrook*, the Eighth Circuit stated, "It is unclear from the complaint whether Alsbrook is asserting an ADA claim against the commissioners in their individual capacities. To the extent that he is, we agree with the panel opinion's conclusion that the commissioners may not be sued in their individual capacities directly under the provisions of Title II." *Alsbrook*, 184 F.3d at 1005 n. 8. In *Montez* the district court stated, " . . . I conclude that individual defendants in their individual capacities are not properly subject to suit under the Rehabilitation or the Disability Act." *Montez*, 32 F.Supp.2d at 1241.

In *Baird*, the Fourth Circuit upheld the district court's dismissal of suits against defendants in their individual capacities, noting that the ADA recognizes a cause of action for discrimination by entities and not private individuals. *Baird*, 192 F.3d at 471. In *Coddington*, the district court held that the individual defendants were not personally liable under the ADA. *Coddington*, 45 F.Supp.2d at 217. The district court went on to find that it was not necessary to allow the plaintiff to pursue his claims against the defendants in their official capacities because official capacity lawsuits are appropriate in cases involving the naming of government officials. *Id.* "Where, as here, there is a private entity to name, there is no reason to allow a plaintiff to proceed against an individual in his 'official capacity.'" *Id.* In *Campos*, the district court dismissed ADA claims against defendants in their individual capacities because the plaintiffs cited no case wherein a court had imposed liability on individuals for violation of Title II of the ADA. *Campos*, 1999 WL 1201809 at *10.

Because plaintiffs have not named defendants in their individual capacities, the cases cited by defendants are

inapplicable. To the extent defendants are arguing that Title II of the ADA prohibits official capacity suits against individual defendants, they have cited no authority for this proposition. Several cases have held that it was not necessary to pursue an official capacity suit where an entity to name exists. *Coddington, supra*, (private entity to name); *see also Hullett v. N.Y. State Dept. of Correctional Services*, No. 99CIV.5853 (DC), 2000 WL 1154284 (S.D.N.Y. Aug. 14, 2000) (Title II claims against individual defendants in their official capacities dismissed as unnecessary where plaintiff asserted claim against government entity).

An official capacity suit for injunctive relief against the individual defendants is proper. *Ruvalcaba v. City of Los Angeles*, 167 F.3d 514, 524, n. 3 (9th Cir. 1999) ("As the Supreme Court has stated, '[o]fficial capacity suits . . . generally represent only another way of pleading an action against an entity of which an officer is an agent.' *Kentucky v. Graham*, 473 U.S. 159, 165, 105 S. Ct. 3099, 87 L.Ed.2d 114 (1985).").

The Ninth Circuit has not addressed the issue of whether an ADA official capacity suit must be dismissed if an entity may be named. However, in *Walker v. Snyder*, 213 F.3d 344 (7th Cir. 2000), as revised, 2000 WL 968023 (July 12, 2000), the Seventh Circuit found that an official capacity suit was proper despite the availability of an "entity" defendant. *Walker*, 213 F.3d at 346 ("The director and all the other defendants must have been sued in their official capacities – that is, as proxies for the state, *Will v. Department of State Police*, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989); *Kentucky v. Graham*, 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985) – rather than their individual capacities . . .).

Based on the cases cited above, this court finds that plaintiffs' official capacity suit is proper. Requiring plaintiffs to file an amended complaint naming an entity at this point in the proceedings, when it is not mandated by case law, would further delay resolution of this action which has been pending for over four years. Accordingly, defendants' motion to dismiss on this ground should be denied.[3]

B. Res Judicata

Defendants next argue that the doctrine of res judicata precludes plaintiff Thompson from bringing the present transactionally related claim. Defendants state that plaintiff Thompson filed a habeas corpus petition in this court challenging the denial of parole on grounds that the Board of Prison Terms established a de facto policy of denying parole to all life prisoners. *Thompson v. Newland*, CIV S-98-1832 FCD GGH P. On September 1, 1999, the court denied the petition. This action is presently on appeal.[4]

"The doctrine of claim preclusion (res judicata) provides that a final judgment on the merits bars a subsequent action between the same parties or their privies

---

[3] Defendants herein have preserved their Eleventh Amendment agreements, but do not press them herein in light of *Dare v. California*, 191 F.3d 1167 (9th Cir. 1999).

[4] Petitioner Thompson's habeas action involved his claim that the Board of Prison Terms automatically" set his term as a life imprisonment term, and that in any event, applying the criteria for parole eligibility consideration, the board arbitrarily denied petitioner the setting of a parole date, i.e., the evidence upon which the Board acted was insufficient.

over the same cause of action." *In re Imperial Corp. of America*, 92 F.3d 1503, 1506 (9th Cir. 1996). " 'The judgment prevents litigation of all grounds and defenses that were or could have been raised in the action.' " *Id.*, quoting *Davis & Cox v. Summa Corp.*, 751 F.2d 1507, 1518 (9th Cir. 1985).

What defendants forget is that this court originally stayed this action for exhaustion of state court remedies after finding that plaintiffs' ADA claim should be raised in a habeas petition. The Ninth Circuit reversed and remanded, finding that plaintiffs' claims did not implicate the invalidity of their continued confinement. Therefore, plaintiff Thompson could not have raised his ADA claim in his previous habeas petition. For that reason, his claim is not barred by the doctrine of res judicata.

C. Rehabilitated Substance Abuser

Defendants argue that plaintiffs' status as rehabilitated drug abusers does not qualify as a disability under the ADA. Section 12102(2) of the ADA defines disability for purposes of all sections of the statute, including Title II, as follows:

> The term "disability" means, with respect to an individual,
>
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

Plaintiffs contend that they are disabled due to their past drug addition. Plaintiffs also argue that they are disabled because defendants perceived them as disabled during the parole proceedings.

Whether past drug addiction is a disability under the ADA is based on the individual history of the plaintiffs and, perhaps, more appropriately litigated in a summary judgment motion. *See Burch v. Coca-Cola*, 119 F.3d 305, 315-16 (5th Cir. 1997) (there must be individualized showing that alcoholic plaintiff suffered impairment, and evidence that alcoholics in general, are impaired is inadequate); *Wallin v. Minnesota Dept. of Corrections*, 153 F.3d 681 (8th Cir. 1997) (plaintiff did not demonstrate that alcoholism impaired major life activity because he was chemical free for one year prior to the period of alleged discrimination and presented no evidence showing that his major life activities were impaired); *Bilodeau v. Mega Industrial*, 50 F.Supp.2d 27 (D.Me. 1999) (fact that plaintiff hospitalized twice for alcoholism does not establish that she has a record of such disability meaning that she has a history of alcoholism that substantially limits a major life activity).

However, assuming without deciding that plaintiffs' past substance abuse is a disability under the ADA, this court finds that Title II is inapplicable to parole hearings in the manner argued by plaintiff.[5] *See infra*, Section E.

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[5] The court also observes that defendants cite *Buckley v. Consolidated Edison Company of New York*, 127 F.3d 270 (2d Cir. 1997), a Title I ADA case, in support of the proposition that the mere status of being a recovering substance abuser does not constitute a substantial limitation on a major life activity. The Second Circuit granted a petition

(Continued on following page)

D. *Turner v. Safley*

Defendants argue that plaintiff's right to accommodation under the ADA is subject to the legitimate penological interest test set forth in *Turner v. Safley*, 482 U.S. 78, 107 S.Ct. 2254 (1987). In *Gates v. Rowland*, 39 F.3d 1439 (9th Cir. 1994), the Ninth Circuit applied the *Turner* test to a claim brought pursuant to the Rehabilitation Act.

In doing so, the Ninth Circuit stated,

> The Act was not designed to deal specifically with the prison environment; it was intended for general societal application. There is no indication that Congress intended the Act to apply to prison facilities irrespective of the consideration of the reasonable requirements of effective prison administration. It is highly doubtful that Congress intended a more stringent application of the prisoners' statutory rights created by the Act than it would the prisoners' constitutional rights. Thus, we deem the applicable standard for review of the Act's statutory rights in a prison setting to be equivalent to the review of constitutional rights in a prison setting, as outlined by the Supreme Court in *Turner v. Safley*, 482 U.S. 78, 107, S.Ct. 2254, 96 L.Ed.2d 64 (1987).

Gates, 39 F.3d at 1446-47.

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for rehearing in *Buckley* and later vacated that decision and affirmed the judgment of the district court. *Buckley v. Consolidated Edison Company of New York*, 155 F.3d 150 (2d Cir. 1998). Therefore, citation to the first *Buckley* decision is improper.

However, applying the *Turner* analysis to substantive decision making in the criminal law context seems like the proverbial square peg being pounded into a round hole. While the construction of facilities and provisions of services and programs in prison in the ADA context can benefit from such an analysis, it is wholly inappropriate to compare "legitimate penological interests" with decisions in the first instance of whether a person should stay in (or go) to prison. The concept of using a *Turner* gloss to determine whether a prisoner's parole should be set because he needs to be "accommodated" under the ADA is also foreign to the criminal sentencing process. Although not directly, defendants' arguments touch upon the real reason why their motion to dismiss should be granted – the ADA simply does not apply to change, modify or supplement the substantive decision making process in the criminal law context. The court now turns to that issue.

E. The ADA Does Not Apply to the Substantive Decision Making Process in the Criminal Law Context

Plaintiffs allege: "Plaintiffs [substance] disabilities substantially limited major life activities of plaintiffs and predisposed them to juvenile delinquency and criminality. Defendants and other state officials have discriminated against plaintiffs by reason of their said disabilities whereby defendants have by their alleged policies and practices [adverse use of substance abuse history] . . . limited plaintiffs in the enjoyment of having parole release dates set. . . . " Complaint at 2. Plaintiffs go on to allege that "[r]easonable accommodations of relapse prevention treatment and other like controls could have been placed

upon the conditions of plaintiff's parole without undue hardship to the Board [or the safety of the community]." Complaint at 35. Finally, the policy of the Board to adversely use substance abuse histories against potentially parole eligible prisoners is a violation of the ADA. Complaint at 36-37. Plaintiffs add that if the "correct" psychological information on plaintiffs' substance abuse were sent to the Board by CDC psychological evaluators, the ADA violations might not occur, although the ultimate conclusion is unclear. Complaint at 42-44. Plaintiffs' request for relief is an injunction precluding the Board from "continuing to deny plaintiffs a parole release date," and "[o]therwise . . . to ensure" that plaintiffs release dates are set in an equitable manner. Complaint at 46.[6] Plaintiffs also seek an injunction to have the CDC psychological evaluations prepared with correct, "legally sufficient" information about substance abuse. Complaint at 47.

However, application of the ADA, along with its concomitant "accommodation" requirements, to substantive criminal law decisions such as the decision to grant or withhold parole, would stretch the parameters of the ADA into a preempting "supra law," something that Congress never intended when enacting the ADA. Perhaps in no other area of the law does Congress have less right to legislate than in the substantive criminal law of the various states.

First, decisions to sentence persons, or decisions not to release persons on parole are not "employment" decisions

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[6] The Ninth Circuit found that plaintiffs were not challenging the fact or duration of their confinement.

(ADA Subchapter I), nor do they implicate the provision of "public services" (ADA Subchapter II). Not only is such a determination common sense, the definitions of the ADA itself do not support plaintiff's conclusion:

a. "The term 'qualified individual with a disability' means an individual . . . who, with or without reasonable accommodation, *can perform the essential functions of the employment position*." 42 U.S.C. § 1211(8) (emphasis added). While it is true that jobs to exists within prison, the decision to send or keep someone in prison cannot logically [sic] related to hiring someone to an employment position.

b. "The term 'reasonable accommodation' may include – (A) making existing facilities . . . readily accessible . . . (B) job restructuring, part-time or modified work schedules. . . . " § 1211(9).

c. "The term 'qualified individual with a disability' means an individual . . . who, with or without reasonable modifications to rules, policies or practices . . . meets the essential *eligibility requirements* for the receipt of services or the participation in programs or activities provided by a public entity." § 12131(2) (emphasis added). Interpreting a prison sentence, including parole criteria related thereto, as "eligibility requirements" for "public service" makes a mockery of common understandings in our society.

There is one case reflecting the above sentiments, not directly on point, but close enough to warrant mention here. *Despears v. Milwaukee County*, 63 F.3d 635 (7th Cir. 1995). In this case, a county employee lost his driver's license because of DUI convictions which then caused him to be demoted at work. The employee contended that his alcoholism was a disability that required accommodation

by the county. In rejecting application of the ADA to such a situation, Judge Posner wrote:

> To impose liability under the Americans with Disabilities Act or the Rehabilitation Act in such circumstances would indirectly but unmistakably undermine the laws that regulate dangerous behavior. It would give alcoholics and other diseased or disabled persons a privilege to avoid some of the normal sanctions for criminal activity. It would say to an alcoholic: We know it is more difficult for you to avoid committing the crime of drunk driving than it is for healthy people, and therefore we will lighten the sanction by letting you keep your job in circumstances where anyone else who engaged in the same criminal behavior would lose it.
>
> The refusal to excuse, or even alleviate the punishment of, the disabled person who commits a crime under the influence as it were of his disability yet not compelled by it and so not excused by it in the eyes of the criminal law is not "discrimination" against the disabled; it is a refusal to discriminate in their favor. It is true that the Americans with Disabilities Act and the Rehabilitation Act require the employer to make a reasonable accommodation of an employee's disability, but we do not think it is a reasonably required accommodation to overlook infractions of law. *Leary v. Dalton*, supra, at 753.

Despears, 63 F.3d at 637.

See also Rosen v. Montgomery County Maryland, 121 F.3d 154, 157 (4th Cir. 1997):

> The most obvious problem is fitting an arrest into the ADA at all. Section 12131(b) defines

> "[q]ualified individual with a disability" as "an individual with a disability who, with or without . . . the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." Rosen clearly has a disability, but calling a drunk driving arrest a "program or activity" of the County, the "essential eligibility requirements" of which (in this case) are weaving in traffic and being intoxicated, strikes us as a stretch of the statutory language and of the underlying legislative intent. See *Gorman v. Bartch*, 925 F.Supp. 653, 655 (W.D.Mo.1996) ("It stretches the statute to talk about the Plaintiff's 'eligibility' to be arrested and taken to jail or to participate in being arrested. . . . "); cf. *Torcasio v. Murray*, 57 F.3d 1340, 1347 (4th Cir. 1995) ("The terms 'eligible' and 'participate' imply voluntariness on the part of an applicant who seeks a benefit from the State; they do not bring to mind prisoners who are being held against their will."), cert. denied, 516 U.S. 1071, 116 S. Ct. 772, 133 L.Ed.2d 724 (1996).
>
> Rosen points to nothing in the ADA itself or in the regulations that specifically bring arrests within the ADA's ambit, despite the fact that such "program or activity" is one that is "participated in" by millions of persons every year.

Of course, the court is not basing its opinion here on the fact that plaintiffs are not voluntarily in prison and therefore, nothing a prison does is considered a "program" or provision of "services" covered by the ADA. Such a belief was firmly rejected by *Pennsylvania Department of Corrections v. Yeskey, supra*. Nor does the court find that the logistics of the criminal process, including such things as

interpreters are never encompassed by the ADA. *See Calloway v. Boro of Glassboro*, 89 F. Supp. 2d 543 (D.N.J. 2000) (finding that the logistics involved in an in-station interrogation may be covered by the ADA. *See also Duffy v. Riveland*, 98 F.3d 447 (9th Cir. 1996) (involving provision of an interpreter at prison disciplinary hearings). The court is differentiating those determinations involving logistics from the substantive criteria that govern discretionary decisions in the criminal process or the discretionary decisions themselves.

Any other interpretation of the ADA would run into the problem of expanding a statute into unconstitutional realms. Absent federal constitutional concerns, the states have nearly comprehensive authority in fashioning and enforcing their criminal laws. *Knapp v. Schweitzer*, 357 U.S. 1, 78 S. Ct. 1302 (1958), overruled in part on other grounds, *Murphy v. Waterfront Commission of N.Y. Harbor*, 378 U.S. 52, 84 S. Ct. 1594 (1968). These are powers that were reserved to the states under the Tenth Amendment to the Constitution. To believe that Congress could pass statutes that dictate to the states what substantive criteria should govern parole decisions, – or for that matter criminal sentences, – or the type and nature of crimes – is foreign to notions of federalism as developed in this country. Certainly the ADA, a statute which does not profess to govern state substantive criminal law at all, should not be interpreted so as to raise the constitutional problem.

Plaintiffs also complain about the quality of the psychological evaluations given to the Board by CDC personnel. Specifically, the evaluations do not contain the type of analysis on substance abuse that plaintiffs would like to see. This assertion as well fails to state a claim. The

ADA is not a mechanism to promulgate correct medical doctrines. *See Olmstead v. L.C.*, 527 U.S. 581, 603 (n.4), 119 S. Ct. 2176, 2188 (1999) (emphasizing that the ADA does not impose a certain medical standard of care); *Rodriguez v. City of New York*, 197 F.3d 611, 618 (2d Cir. 1999) (no claim under ADA is stated for dispute as to substance of services provided). Neither is "[t]he Act [ ] a general protection of medically afflicted persons." *Christian v. St. Anthony's Medical Center*, 117 F.3d 1051, 1052 (7th Cir. 1997). The instant allegation of insufficient medical evaluation reports is simply a backdoor way of asserting that the Board must consider plaintiffs disabled by reasons of past substance abuse, and must take into account such disability when rendering a parole eligibility decision.

The court cannot conceive of a possible way that plaintiffs can amend their complaint to state a claim especially in light of the relief that they seek. Therefore, the court will recommend that the action be dismissed without leave to amend.

Accordingly, defendants' motion to dismiss should be granted on grounds that the ADA does not apply to parole consideration hearings.

Accordingly, IT IS HEREBY ORDERED that plaintiffs' March 21, 2000, motion for a more definite statement is deemed resolved;

Accordingly, IT IS HEREBY RECOMMENDED that defendants' motion to dismiss filed March 22, 2000, be granted.

These findings and recommendations are submitted to the United States District Judge assigned to the case,

pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

DATED: October 6, 2000.

/s/ Gregory G. Hollows
UNITED STATES
MAGISTRATE JUDGE

United States District Court
for the
Eastern District of California
October 10, 2000

* * CERTIFICATE OF SERVICE * *

2:96-cv-00297

Thompson

v.

Wilson

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on October 10, 2000, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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Jack L. Wagner, Clerk

/s/ [Illegible]
by: Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CHARLES W. THOMPSON, et al.,

Plaintiffs

vs.

GREY DAVIS, et al.,

Defendants.

/

No. CIV S-96-0297 GEB GGH P

ORDER

(Filed DEC 12, 2000)

Plaintiff, a state prisoner proceeding pro se, has filed this civil rights action seeking relief under 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On October 10, 2000, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within twenty days. Plaintiffs have filed objections to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 72-304, this court ahs conduced a *de novo* review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed October 10, 2000, are adopted in full: and

2. Defendants' motion to dismiss filed March 22, 2000, is granted.

DATED: December 12, 2000.

/s/ Garland E. Burrell
UNITED STATES
DISTRICT JUDGE

United States District Court
for the
Eastern District of California
December 12, 2000

* * CERTIFICATE OF SERVICE * *

2:96-cv-00297

Thompson

v.

Wilson

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on December 12, 2000, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery

receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES W. THOMPSON; STEPHEN BOGOVICH, Plaintiffs - Appellants, v. GRAY DAVIS, Governor State of California; JOSEPH SANDOVAL, Secretary of Youth and Corrections Agency; JAMES GOMEZ, Director of the Dept. of Corrections; JOHN W. GILLIS, Commissioner of the Board of Prison Terms; JAMES W. NIELSEN, Chairman of the Board of Prison Terms, Defendants - Appellees.	No. 01-15091 D.C. No. CV-96-00297-GEB(GGH) ORDER DENYING MOTION FOR RE-CONSIDERATION (Filed Aug. 8, 2002)

Before: BRIGHT,[1] B. FLETCHER and FISHER, Circuit Judges.

The amendments to the opinion were for clarification and did not negatively affect the rights of the

[1] The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

defendants. The defendants are not entitled to file a renewed petition for rehearing. The motion for reconsideration is denied. No further filings will be accepted in this appeal. The mandate shall issue forthwith.

Office of the Clerk United States Court of Appeals
for the Ninth Circuit
95 Seventh Street, P. O. Box 193939
San Francisco, CA 94119-3939

August 8, 2002

USDC, Sacramento
Eastern District of California (Sacramento)
Room 4-200
501 "I" Street
Sacramento, CA 95814

C.A. NO.	TITLE	AGENCY/ D.C. NO.
01-15091	Thompson v. Davis	CV-96-00297-GEB(GGH)

Dear Clerk:

The following document(s) in the above listed cause(s) is (are) being sent to you under cover of this letter.

[X] Certified copy of the Decree of the Court

[ ] Judgment of the National Labor Relations Board

[ ] Certified copy of the Entry of Dismissal

The record on appeal will follow under separate cover.

Please acknowledge receipt on the enclosed copy of this letter.

Very truly yours,
Cathy A. Catterson
Clerk of Court
By: Juanja V. Ross,
Deputy Clerk

Enclosure(s)
cc: ALL COUNSEL

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AUG-8 2002
MANDATE ISSUED

NO. 01-15091
CT/AG#: CV-96-00297-GEB(GGH)

CHARLES W. THOMPSON;
STEPHEN BOGOVICH

Plaintiffs - Appellants

v.

GRAY DAVIS, Governor State of California; JOSEPH SANDOVAL, Secretary of Youth and Corrections Agency; JAMES GOMEZ, Director of the Dept. of Corrections; JOHN W. GILLIS, Commissioner of the Board of Prison Terms; JAMES W. NIELSEN, Chairman of the Board of Prison Terms

Defendants - Appellees

APPEAL FROM the United States District Court for the Eastern District of California (Sacramento).

THIS CAUSE came on to be heard on the Transcript of the Record from the Untied States District Court for the Eastern District of California (Sacramento) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is REVERSED and REMANDED.

Filed and entered March 8, 2002
Amended July 3, 2002
2nd Amendment August 5, 2002

(2)

FILED
FEB 20 2003
OFFICE OF THE CLERK

No. 02-724

In The Supreme Court Of The United States

OCTOBER TERM, 2002

GRAY DAVIS, et al., *Petitioners*,
v.
CHARLES W. THOMPSON and
STEPHEN L. BOGOVICH, et al., *Respondents*..

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counsel for Respondents

19 pp

QUESTION PRESENTED

Whether the Ninth Circuit was correct to find that state parole board decisions are subject to Title II of the ADA, which explicitly applies to *all* state agencies?

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A. Defendants Failed to Raise Their Eleventh Amendment Argument in the Ninth Circuit --------- 2

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STATEMENT OF THE CASE

Respondents ("plaintiffs") are California state prisoners serving indeterminate life terms who allege that the state Board of Prison Terms (BPT) has discriminated against them because of their disabilities. App. 4. Plaintiffs sued state parole officials, asserting that the way in which they consider a prisoner's substance abuse history when making parole decisions violates Title II of the Americans with Disabilities Act (ADA). *Id.* Specifically, plaintiffs allege that petitioners ("defendants") fail to make an individualized consideration of their disabilities and the way in which those disabilities may be accommodated in determining their suitability for release on parole. App. 5. Plaintiffs seek only prospective injunctive relief: an injunction banning the BPT from "[c]ontinuing to deny plaintiffs a parole release date primarily because of their substance abuse disabilities." *Bogovich v. Sandoval*, 189 F.3d 999, 1001 (9th Cir. 1999).

Defendants filed a motion to dismiss based on four grounds: "1) no proper defendant named; 2) res judicata bars plaintiff Thompson's claims; 3) rehabilitated substance abusers are not disabled within the meaning of the ADA; and 4) legitimate penological interests mandate consideration of past substance abuse." App. 19-20. The magistrate judge rejected all four grounds but *sua sponte* and without any briefing from the parties, recommended dismissal of plaintiffs' claims because, he reasoned, they are not cognizable under the ADA. App. 27-32. The district court adopted the magistrate judge's recommendations and dismissed plaintiffs' action without leave to amend. App. 37.

On appeal, the Ninth Circuit reversed the dismissal, holding that "parole proceedings constitute an activity of a public entity that falls within the ADA's reach" and that "a broad rule categorically excluding parole decisions from the scope of Title II is not the law." App. 14 (quotation and internal quotations omitted).

Defendants now petition for writ of certiorari.

ARGUMENT

I. THIS COURT SHOULD DENY CERTIORARI ON DEFENDANTS' ELEVENTH AMENDMENT ISSUE BECAUSE THEY FAILED TO RAISE IT IN THE NINTH CIRCUIT

A. Defendants Failed to Raise Their Eleventh Amendment Argument in the Ninth Circuit

Defendants argue in their Petition for Certiorari that Congress failed properly to abrogate states' Eleventh Amendment immunity in passing Title II of the ADA, and claim that there is a Circuit split on this issue. Defendants urge the Court to grant certiorari in the present case to resolve the question of whether Congress acted within its Fourteenth Amendment powers in passing the statute. However, because defendants failed to raise the issue below and it was neither considered nor decided by the Ninth Circuit, the Court should deny certiorari. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them") (citations omitted).

The Ninth Circuit opinion from which defendants seek

review makes no reference to Eleventh Amendment immunity. App. 1-14. This is not surprising, since defendants failed properly to raise this argument in their briefing to the Ninth Circuit: their "Question Presented" to the lower court challenged only the scope of Title II, not its constitutional validity.[1] Their brief did the same.[2] In fact, defendants took the position in the Ninth Circuit that Title II of the ADA does apply to prison officials. Their only argument in the lower court was that the ADA should not be extended to reach the facts before the court - not that it is

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[1] Defendants' "Question Presented" to the Ninth Circuit is as follows: "Should this Court affirm the District Court's holding that the civil remedies permitted under the [ADA] do not apply to or infringe upon the substantive decisions of a state's criminal justice system?"

[2] The headings in the argument section of defendants' brief are the following: "I. THE DISTRICT COURT CORRECTLY HELD THAT THE CIVIL AMERICANS WITH DISABILITIES ACT FINDS NO APPLICATION TO SUBSTANTIVE STATE CRIMINAL JUSTICE SYSTEM DECISIONS"; "A. This Court Should Affirm the District Court Based Upon Deficiencies Specific to Inmate Thompson and Bogovich's Complaint"; "B. This Court Should Affirm the District Court Because the ADA Serves to Provide Civil Remedies Rather than Dictating Substantive Decisions Regarding State Criminal Justice Systems"; and "II. LEGITIMATE PENOLOGICAL INTERESTS IN PROTECTING THE LAW ABIDING PUBLIC FROM CONVICTED MURDERERS MANDATES CONSIDERATION OF PAST SUBSTANCE ABUSE."

an invalid exercise of Congress's Fourteenth Amendment powers.

The passing reference in a footnote to this Court's holding in *Board of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001), that defendants made in their brief is insufficient to raise the issue. In *Garrett*, the Court held that Title I of the ADA does not abrogate states' Eleventh Amendment immunity. *Id.* at 374. The Court explicitly limited its holding to Title I, taking no position as to the constitutional validity of Title II. *Garrett*, 531 U.S. at 360 n.1 ("[w]e are not disposed to decide the constitutional issue whether Title II, which has somewhat different remedial provisions from Title I, is appropriate legislation under § 5 of the Fourteenth Amendment"). In their footnote, defendants hinted that *Garrett*'s holding could apply to Title II. Their only argument on Title II's validity was that "no principled distinction exists between Title I and Title II as both relied upon the same insufficient findings of Congress." In fact, *Garrett* made it quite clear on the exact page cited by defendants that there is a significant difference in the Congressional findings between Title I on the one hand and Titles II and III on the other:

> . . . somewhere around 50 of [the allegations listed in Judge Breyer's dissenting opinion] describe conduct that could conceivably amount to constitutional violations by the States. . . . The overwhelming majority of these accounts pertain to alleged discrimination by the States in the provision of public services and public accommodations, which areas are addressed in

Titles II and III of the ADA.

Garrett, 531 U.S. at 372 n.7. Defendants failed to provide in their footnote any analysis as to why the Congressional findings do not support Title II. Such an analysis is crucial, given *Garrett*'s distinction between the evidence on Title I and Title II.

The unsupported statement in a footnote that *Garrett*'s detailed factual findings apply to Title II as well as Title I is insufficient to raise this issue before the Ninth Circuit. The Ninth Circuit's silence on the issue reflects that fact. Certiorari should therefore be denied.

B. This Court Should Deny Certiorari on Defendants' Eleventh Amendment Argument Because *Ex parte Young* Allows Plaintiffs to Sue State Officials for Injunctive Relief and Because the State Officials in this Case Have Been Determined to Be Proper Defendants

Under the *Ex parte Young* doctrine, plaintiffs may sue state officials in their official capacity for injunctive relief. *Ex parte Young*, 209 U.S. 123 (1908); *Garrett*, 531 U.S. at 374 n.9. In the present case, plaintiffs sued state officials in their official capacity for injunctive relief. App. 20. Thus, *Ex parte Young* applies, making Eleventh Amendment immunity inapplicable.

In their Petition for Certiorari, defendants argue that the *Ex Parte Young* doctrine is not available to plaintiffs because it applies only when the defendants are individuals. According to defendants, individuals cannot be sued under Title II of the ADA, which applies to "public entities." Thus, under defendants' theory, *Ex parte Young* will never apply

to ADA Title II cases. Also under this theory, the defendants themselves are improperly sued.

This argument fails because the district court in this case has already determined that the defendant state officials are proper defendants. App. 20-23. Since defendants did not appeal this finding, they have waived their right to argue this point here or in the lower court. *See, e.g., Nelson v. Adams USA, Inc*, 529 U.S. 460, 469 (2000) (noting "the general rule that issues must be raised in lower courts in order to be preserved as potential grounds of decision in higher courts").

Because defendants have failed properly to raise and argue in the Ninth Circuit the Eleventh Amendment issues they now present to this Court, and because the Ninth Circuit neither considered nor decided any Eleventh Amendment issues, defendants' petition for certiorari must be denied.

II. CERTIORARI SHOULD BE DENIED BECAUSE THERE IS NO CIRCUIT SPLIT OVER WHETHER THE ADA APPLIES TO ALL ACTIVITIES OF A PUBLIC ENTITY

According to defendants, the Ninth Circuit's holding constitutes a "unique" application of the ADA in a "substantive criminal-justice context." They argue that the decision below created a conflict among the Circuits. There is no conflict here. The decisions defendants rely on are based on a completely different factual context — discriminatory arrests — that has little application to parole proceedings.

A. The Ninth Circuit Decision Is Consistent with Decisions of this Court and of the Courts of Appeal

Defendants' argument is fatally flawed for three reasons. First, the Ninth Circuit held in this case that the ADA applies to parole boards like it applies to all other state entities and forbids them from discriminating based on disability. Thus, if a parole board refused to release prisoners who use wheelchairs because they use wheelchairs, or diabetics because they are diabetics, the ADA would provide a cause of action. No court has held to the contrary. Thus, there is no conflict with cases of this Court or with other Circuits.

Second, there is nothing "unique" about the Ninth Circuit's opinion in this case. It is an unremarkable application of this Court's holding in *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 209 (1998), that Title II applies to the operations of all public entities, including criminal justice agencies such as prisons. In *Yeskey*, this Court held unanimously that by its plain language the statute "unambiguously extends to state prison inmates." 524 U.S. at 209-210. In the present case, the Ninth Circuit similarly held that "the plain language of the ADA extends its anti-discrimination guarantees to the parole context. . . . Like state prisons, state parole boards 'fall squarely within the statutory definition of "public entity," which includes "any department, agency, special purpose district, or other instrumentality of a State or States or local government."'" App. 13 (quoting *Yeskey*, 118 S. Ct. at 1954-55, in turn quoting 42 U.S.C. § 12131(1)(B)).

Third, it is defendants' theory — that the decision to

release a prisoner on parole is so important it should be exempt from anti-discrimination law — that is unique and conflicts with decisions by this Court and by Courts of Appeal. This theory flies in the face of *Yeskey*, in which this Court held that the ADA applies to the determination as to whether a prisoner would be placed in a boot camp program that would reduce his sentence by at least a year. *Yeskey*, 524 U.S. at 208. There is no principled distinction to be made between the sentence-shortening decision challenged in *Yeskey* and the parole decisions challenged in the present case. Moreover, as the Ninth Circuit found, defendants' theory also directly contradicts decades of well-established case law requiring state parole officials to follow federal anti-discrimination requirements:

> [f]or example, circuit courts have long held that parole boards may not exclude an inmate from consideration for parole based on race. *See, e.g., White v. Bond*, 720 F.2d 1002, 1003 (8th Cir. 1983); *Candelaria v. Griffin*, 641 F.2d 868, 870 (10th Cir. 1981).

App. 11. The court thus concluded, "[t]he fact that considering a prisoner for parole is a substantive, criminal law decision does not license the decision-maker to discriminate on impermissible grounds." *Id.* at 12-13.

B. The Cases On Which Defendants Rely Do Not Support Their Argument of a Conflict among the Circuits

Defendants' theory of a Circuit split relies on four cases involving claims of discriminatory arrests: *Rosen v. Montgomery County Maryland*, 121 F.3d 154 (4th Cir.

1997); *Hainze v. Richards*, 207 F.3d 795 (5th Cir.), *cert. denied*, 531 U.S. 959 (2000); *Bryant v. Madigan*, 84 F.3d 246, (7th Cir. 1996); and *Gohier v. Enright*, 186 F.3d 1216 (10th Cir. 1999). Even assuming that arrests are sufficiently similar to parole decisions to create a circuit split, defendants' argument fails. Two of defendants' four arrest cases, *Rosen* and *Bryant*, were decided before *Yeskey* and have been implicitly overruled by that case. The other two cases involved Courts of Appeal grappling with how, and not whether, to apply the ADA to arrests.

The Fourth Circuit's holding in *Rosen v. Montgomery County Maryland* questions in *dicta* whether arrests are covered by the ADA.[3] *Rosen*, 121 F.3d at 157. The only two cases cited by the Fourth Circuit in this passage are no longer good law. *Gorman v. Bartch*, 925 F. Supp. 653 (W.D. Mo. 1996), was reversed by *Gorman v. Bartch*, 152 F.3d 907, 912-13 (8th Cir. 1998). The holding in *Torcasio v. Murray*, 57 F.3d 1340 (4th Cir. 1995), *cert. denied*, 516 U.S. 1071 (1996), that the involuntariness of prisoners' participation in programs, services, and activities of corrections departments renders them ineligible to file ADA Title II claims, was thoroughly

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[3] The holding actually did not address the scope of Title II. The court rejected the plaintiff's claim of disability discrimination in his arrest based on "the lack of any discernible injury," not because discriminatory arrests are not cognizable under the ADA. *Rosen*, 121 F.3d at 158. *Rosen* is thus also inapposite to defendants' theory because its holding does not conflict with the holding in the present case.

discredited by this Court in *Yeskey*, 524 U.S. at 211.

Similarly, defendants quote the Seventh Circuit for the proposition that "incarceration. . . is not a 'program' or 'activity' covered by the ADA." *Bryant*, 84 F.3d at 249. This holding was overturned two years later by this Court in *Yeskey*. *Yeskey*, 524 U.S. at 210-11.

In *Gohier v. Enright*, the Tenth Circuit held that "a broad rule categorically excluding arrests from the scope of Title II. . . is not the law," 186 F.3d. at 1221, and went on to grapple with how to apply the ADA to the particularities of the arrest process in the case before it. The court thus distinguished between coverage of the statute, which is extremely broad, and the application of the statute, in which real world dangers and necessities might limit the ways in which plaintiffs can obtain relief.

In the present case, the Ninth Circuit quoted *Gohier* in its conclusion, holding that a broad rule categorically excluding the parole process from the scope of Title II is not the law. App. 14. Thus *Thompson* is entirely consistent with *Gohier* and there is no Circuit split. Moreover, the Ninth Circuit took pains to note that the question of exactly how the ADA will apply to parole requires a detailed consideration of the particulars of the parole process as well as a sensitivity to the public safety issues and penological interests involved.[4] App. 12 n.4. The court thus recognized that although the plain language of the ADA

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[4] The present case was dismissed on a motion to dismiss and thus lacks the factual development found in *Gohier* and *Hainze*, both of which were summary judgment cases.

allows for no sweeping exceptions, as this Court affirmed in *Yeskey*, its application requires a careful assessment of the particularities of the situation before the court.

In *Hainze v. Richards*, the Fifth Circuit also grappled with how exactly the ADA applied during an arrest. In *Hainze*, a suicidal, mentally ill man with a knife refused to obey a police officer's orders to disarm and walked directly towards the officer, holding out his knife. The officer shot him and Hainze later claimed that the failure to reasonably accommodate his mental illness constituted disability discrimination. In finding that the plaintiff did not state a claim under Title II of the ADA, the Fifth Circuit explicitly limited its holding to the facts of the case; it stated that the officer's actions

> were the result of a quick discretionary decision made in self-defense and for the safety of those at the scene. We are not persuaded that requiring [the officer] and other similarly situated officers to use less than reasonable force in defending themselves and others, or to hesitate to consider other possible actions in the court of making such split-second decisions, is the type of 'reasonable accommodation' contemplated by Title II.

Id. at 801-02. In other words, no accommodation would be reasonable under those particularized circumstances. The Fifth Circuit affirmed, however, that apart from the extraordinary circumstances of such an exigent moment, when personal safety and security are no longer directly

endangered, reasonable accommodations must be made:

> [o]nce the area was secure and there was no threat to human safety, the [officers' would have been under a duty to reasonably accommodate Hainze's disability. . . That would have put this case squarely within the holdings of . . . *Yeskey* and the cases that have followed.

Id. at 802.

Thus *Hainze* never challenged the ADA's scope. Instead, it grappled with how the statute applies to particular circumstances. The court relied on a "safety and security" exception to the ADA's reasonable accommodation requirement, an exception explicitly recognized in the ADA itself. *See, e.g.*, Department of Justice, App. A to 28 C.F.R. Part 35 at 35.104 (discussing ADA requirement that "a person who poses a significant risk to others will not be 'qualified,' if reasonable modifications to the public entity's policies, practices, or procedures will not eliminate that risk"). The Fifth Circuit, therefore, is entirely consistent with the Tenth Circuit in *Gohier* and the Ninth Circuit in the present case.

Defendants' attempt to create a conflict among the Circuits over the existence of a "substantive criminal-justice context" exception to the ADA fails: no Circuit court opinion has found such an exception. The Ninth Circuit decision in this case was simply an application of this Court's decision in *Yeskey*, and is consistent with all the post-*Yeskey* holdings of other Circuit courts.

CONCLUSION

The first question presented in defendants' petition, Eleventh Amendment immunity, does not provided the basis for review by this Court since it was neither argued nor decided in the Ninth Circuit. The second question presented is also inadequate, since no Court of Appeal has ever found a "substantive criminal-justice context" exception to the ADA and thus there is no conflict among the Circuits on this point. The opinion below is consistent with the opinions of this Court and with the opinions of the other Circuits that have addressed this issue. Therefore, the Petition for Certiorari should be denied.

Dated: February 19, 2003

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No. 02-724

In The Supreme Court of The United States

OCTOBER TERM, 2002

GRAY DAVIS, Governor of State of California, et al. *Petitioner*;

v.

CHARLES W. THOMPSON, et al. *Respondent;*

Opposition To The Petition For Writ Of Certiorari To The Supreme Court of California

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CERTIFICATE OF SERVICE BY MAIL

Donald Specter, a member of the Bar of the Supreme Court of the United States, states: that his business address is General Delivery, San Quentin , CA; that on February 20, 2003, he served three copies of OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI in the above-entitled matter on the respondents by placing same in an envelope addressed as follows:

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Said envelope was then sealed and deposited in the United States mail at San Rafael, California, with the postage thereon fully prepaid.

Donald Specter
Counsel of Record for Petitioner

Supreme Court, U.S.
FILED
MAR 7 2003

No. 02-724

IN THE SUPREME COURT OF THE UNITED STATES

GRAY DAVIS, ET AL.,
Petitioners,

v.

CHARLES W. THOMPSON, and STEPHEN L. BOGOVICH,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL FOR
THE NINTH CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

No. 02-724

GRAY DAVIS, ET AL.,
Petitioners,

v.

CHARLES W. THOMPSON, and STEPHEN L. BOGOVICH,
Respondents.

INTRODUCTION

Petitioners, led by Governor Gray Davis of the State of California, seek a writ of certiorari to resolve circuit conflicts created or exacerbated by the Ninth Circuit's second amended opinion in *Thompson v. Davis*, 282 F.3d 780 (9th Cir. 2002). Petitioners' first question presented asks this Court to resolve the splintered circuit authority addressing whether Congress validly abrogated the state's Eleventh Amendment immunity from suit in enacting Title II of the Americans with Disabilities Act ("ADA"). Petitioners' second question presented asks this Court to resolve conflicting circuit views on whether the ADA governs substantive criminal-justice decision making, such as state officials' decision to parole or arrest, as contrasted with operational aspects of law enforcement such as providing prisoners wheelchairs to attend parole hearings or safely transporting disabled arrestees.

On January 6, 2003, this Court requested a response from Respondents. After one time extension, Respondents filed their opposition on February 20, 2003. Respondents contend that this Court cannot address the first question because of the manner in which the parties addressed the Eleventh

Amendment issue before the Ninth Circuit. Respondents further contend that the second issue was resolved by *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206 (1998), and that the division between the circuits is either negated by *Yeskey* or otherwise not sufficiently specific to warrant review. Petitioners now respectfully reply to these contentions and renew their request that this Court grant their petition for a writ of certiorari to resolve these important and divisive issues.

ARGUMENT

I.

PETITIONERS' ELEVENTH AMENDMENT ISSUE WAS PRESENTED BEFORE THE NINTH CIRCUIT AND IS ACCORDINGLY PROPER BEFORE THIS COURT

A. Petitioners and Respondents Both Presented the Eleventh Amendment Immunity Issue to the Ninth Circuit

Respondent contends that Petitioners failed to raise the issue of Eleventh Amendment immunity from suits under Title II of the Americans with Disabilities Act before the Ninth Circuit. Respondent bases this contention primarily on the headings in Petitioners' appellees brief before that court. However, Respondent also recognizes that Petitioner in fact raised the Eleventh Amendment bar to suit before the Ninth Circuit and analogized to *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001). (Opposition, p. 4.) Accordingly, the issue was raised and is appropriately before this Court.

The fact that the Ninth Circuit has declined to conduct a *Garrett* analysis, and that the *Thompson* panel chose to reject Petitioner's contention *sub silentio*, is in no small part the issue presented by Petitioner's petition. *See, e.g., Hason v. Med. Bd. of Cal.*, 279 F.3d 1167, 1171-72 (9th Cir.), *cert. granted*, 123 S.Ct. 561 (2002). As Ninth Circuit dissenters

recognized in their published dissent to the court denying rehearing *en banc* in *Hason*, it is the court's refusal to conduct the analysis that creates "a split with every other circuit to have considered the issue" presented by *Garrett*. *Hason v. Med. Bd. of Cal.*, 294 F.3d 1166, 1168 (9th Cir. 2002) (O'Scannlain, J., dissenting to denial of petition for rehearing *en banc*). The *Thompson* panel simply followed the Ninth Circuit's pre-existing decisions not to conduct a *Garrett* analysis.

Respondent's opposition overlooks subsequent briefing on the *Garrett* issue. Prior to hearing *Thompson*, the Ninth Circuit published *Armstrong v. Davis*, 275 F.3d 849, 878 (9th Cir. 2001), *cert. denied*, 123 S.Ct. 72 (2002). *Armstrong* addressed the *Garrett* issue *sua sponte* and despite the State of California declining to take a position at that time. *Id.* at 878-79 and n.42. *Armstrong* then held the defense waived, yet proceeded to rule that *Garrett* would not bar an ADA Title II action against official capacity defendants. Respondents then raised this argument before the *Thompson* panel pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure. (App. A.) Petitioners responded by briefing the issue in their own Rule 28(j) letter. (App. B.) Accordingly, based either on Petitioners raising *Garrett* in their appellees' brief or on the subsequent Rule 28(j) briefing, the *Thompson* panel received notice of the Eleventh Amendment defense.

Respondents reference no authority for the proposition that this Court cannot grant a *certiorari* petition in order to resolve an issue raised before, but not addressed by, the court below. Respondents instead rely exclusively on *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) for the quoted proposition that "[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." (Opposition, p. 2.) As addressed *supra*, both Petitioners and Respondents raised the issue before the *Thompson* panel.

Additionally, Respondent offers no opposition to Petitioner's reliance on *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 467 (1945), as an alternative basis to hear this

Eleventh Amendment immunity challenge. (Petition, Statement of Jurisdiction, p. 1-2.) This exception is well-grounded in this Court's precedent. *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 683, n.18 (1982) (plurality opinion); *Calderon v. Ashmus*, 523 U.S. 740, 745, n.2 (1998); *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99, n.8 (1984); *Edelman v. Jordan*, 415 U.S. 651, 677-78 (1974). Either on this ground, or by recognizing that the parties raised this issue before the *Thompson* panel, Petitioner's *Garrett* challenge is properly before this Court.

B. Petitioners Properly Raised the *Ex Parte Young* Exception as a Necessary Component of Evaluating Eleventh Amendment Immunity From Suit

Respondents next contend that the question of an *Ex Parte Young*, 209 U.S. 123 (1908), exception to Eleventh Amendment immunity may be independently barred from this Court's analysis. Respondents base their opposition on the district court's December 12, 2000, order finding that held official capacity defendants were proper in this action. Respondents overlook the fact that this Court decided *Garrett* on February 21, 2001, two months after the district court's order. (*See* Petition, App. C at 36-37.) Accordingly, Petitioners could not have raised the *Ex Parte Young* argument pursuant to *Garrett*. Instead, this exception to the Eleventh Amendment is an integral component of Petitioner's *Garrett* challenge itself.

Moreover, *Armstrong* resolved the Ninth Circuit view of the *Ex Parte Young* exception in the same manner as it addressed *Garrett*. *Armstrong*, 275 F.3d at 879. The Ninth Circuit recognizes that the appearance of "new law during an appeal ordinarily calls simply for application of the new law." *Montana Wilderness Ass'n v. United States Forest Serv.*, 655 F.2d 951, 955 (9th Cir. 1981). Petitioners accordingly and necessarily petition from the Ninth Circuit's present statement of the law, not the superceded, pre-*Garrett* and pre-*Armstrong* ruling from the district court below.

Respondents' sole legal citation on this issue requires no contrary finding. Respondents reference *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469 (2000) for the proposition that Petitioner's decision not to appeal a case won at the district court could deny this Court opportunity to hear the issue. *Nelson*, however, held only that "the lower court be fairly put on notice as to the substance of the issue." As addressed *supra*, Petitioners made the Ninth Circuit aware of the substantive *Garrett* issue in their appellees' brief, and both parties subsequently made the court aware of the *Armstrong* decision's impact on that analysis. In addressing *Garrett* and *Ex Parte Young*, the *Armstrong* decision and the parties' briefing provided the *Thompson* panel notice of this issue. Additionally, Petitioner's Rule 28(j) briefing raised a myriad of opinions addressing this issue. (App. B.) Accordingly, based either upon the parties explicitly addressing this issue or the analytical inseparability of a rule and its exception, Petitioners' *Ex Parte Young* analysis is properly before this Court.

II.

RESPONDENTS' MISUNDERSTANDING OF PETITIONER'S CONTENTIONS DO NOT NEGATE THE EXISTING CIRCUIT SPLIT

A. The Ninth Circuit's Opinion is Not Controlled By *Pennsylvania Dept. of Corrections v. Yeskey*

Respondents initially contend that certiorari is unwarranted because substantive criminal-justice decisions are governed by the ADA pursuant to *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 209 (1998). *Yeskey* prohibited prison officials from denying prisoners access to a "boot camp" program that, if successfully completed, would have reduceD the prisoner's term of incarceration. *Id.* at 208. However, *Yeskey* did not purport to govern the substantive decision to actually parole the prisoner or to resolve conflicts between the circuits in applying the ADA to substantive decision-making.

Petitioners do not ask this Court to reconsider ADA applicability to the operational aspects of a criminal justice system, such as providing prisoners wheelchairs to attend parole hearings or requiring police officers to transport disabled arrestees safely. Instead Petitioners present the distinct issue of whether the ADA also governs substantive aspects of a state's criminal-justice system such as life prisoner parole suitability determinations or arrests. Accordingly, *Yeskey* did not address this issue and does not control.

B. Petitioners' Referenced Authorities Reflect a Circuit Split Applying the ADA to Substantive Criminal-Justice Matters

Respondents contend that no circuit division exists with regard to applying the ADA to substantive criminal-justice matters. In opposing the petition, Respondents narrowly construe the issue, contending that no other circuit has addressed the issue of applying ADA relief specifically within the context of a state's substantive decision to parole. Petitioners recognize that no other circuit had extended ADA relief in this manner before *Thompson*, just as no other circuit has subsequently adopted the Ninth Circuit's *Thompson* opinion. Respondent's narrow framing of this issue would effectively insulate unique holdings such as *Thompson* from this Court's review. Petitioner's analysis instead appropriately and explicitly addresses the Ninth Circuit's unique extension of the ADA in the more general context of substantive criminal-justice decision making.

Respondents additionally contend that the contrary opinions of *Rosen v. Montgomery County Maryland*, 121 F.3d 154 (4th Cir. 1997) and *Bryant v. Madigan*, 84 F.3d 246 (7th Cir. 1996), should not be considered because they predate *Yeskey*. However, as addressed *supra*, *Yeskey* governed only the operational aspect of a prison program rather than the substantive decision to parole. Additionally, while Respondents contend that these opinions were "implicitly overruled" by *Yeskey*, they cannot identify any opinion of the

deciding courts reversing *Rosen* or *Bryant*. Accordingly, these opinions remains illustrative of circuit precedent contrary to the Ninth Circuit's *Thompson* approach.

Respondents additionally take issue with *Gohier v. Enright*, 186 F.3d 1216 (10th Cir. 1999), and recognize that the *Thompson* panel relied on *Gohier* for the proposition that arrests are not categorically excluded from the scope of the ADA. This overlooks the *Gohier* holding, however, that limited ADA theories to operational issues such as officer training or transport of disabled arrestees. *Gohier*, 186 F.3d at 1222. *Gohier* held that allegations that police chose to shoot a disabled man with a knife, who was wielding the knife because of his disability, stated no ADA claim. *Id.* at 1222. Petitioners accordingly rely on *Gohier* distinguishing between operational aspects of the system and the substantive decisions of state agents, a distinction that the *Thompson* panel declined to recognize.

Petitioners similarly rely upon *Hainze v. Richards*, 207 F.3d 795, 797, 801-02 (5th Cir.), *cert. denied*, 531 U.S. 959 (2000), and its analogous analysis and result. Accordingly, both *Gohier* and *Hainze* conflict with the Ninth Circuit's extension of ADA relief into the decision-making process itself. *Rosen* or *Bryant*, independent of *Yeskey*, provide additional analytical support contrary to the Ninth Circuit's *Thompson* approach. Accordingly, the question of ADA applicability to substantive criminal-justice decision making remains one that divides the circuits, and that calls for resolution by this Court.

CONCLUSION

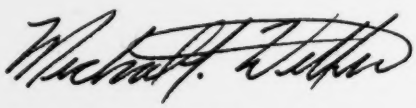
Petitioner's first question presented asks this Court to resolve the splintered circuit court authority governing Eleventh Amendment abrogation under Title II pursuant to the *Garrett* analytical model. This issue is properly before this Court because Petitioners raised it in their appellees brief below, and because both parties briefed the issue pursuant to *Armstrong*. Petitioners' second question presents a significant circuit division regarding ADA applicability to the substantive

criminal-justice decision making of state actors. Both divisions of authority provide grounds for resolution by this Court. Petitioners accordingly and respectfully request that this Court grant their petition for a writ of certiorari to resolve these important and divisive issues.

Dated: March 4, 2003

Respectfully submitted,

BILL LOCKYER, Attorney General
of the State of California
ROBERT R. ANDERSON
Chief Assistant Attorney General
PAUL GIFFORD
Senior Assistant Attorney General



MICHAEL J. WILLIAMS
Deputy Attorney General

Counsel of Record for Petitioners

APPENDIX A

February 25, 2002

Cathy Catterson, Clerk
United States Court of Appeal
for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: *Thompson v. Davis*
NO. 01-15091

Dear Ms. Catterson:

Pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, I write to bring to the Court's attention the recent case of *Hason v. Medical Board of California*, No. 00-55980, 2002 D.J.D.A.R. 1737 (Feb. 12, 2002). The case, a challenge to the actions of a state agency under Title 11 of the ADA, is relevant to two issues in this appeal.

First, the Court in *Hason* held that "the Eleventh Amendment does not bar [the plaintiff's] Title II claims," in light of the Supreme Court's decision in *Board of Trustees of Univ. of Alabama v. Garrett,* 531 u.s. 356 (2001) (Congress did not validly abrogate the state sovereign immunity in enacting Title I of the ADA). *Hason*, 2002 D.J.D.A.R. 1737 at 1738. Thus, post-*Garrett*, the Court reaffirmed the rule in this Circuit that Congress did validly abrogate state soverien [sic] immunity in enacting Title II of the ADA. This is relevant to appellees' argument that the ADA impinges on states' Elevent Amendment rights and bars appellants' suit. Appellees' Opp. At 8; Appellants' Reply Brf. At 10-11.

Second, the Court in *Hason* held that Title II of the ADA applies to medical licensing, explaining that

> the magistrate judge's narrow construction of the phrase "services, programs, or activities" is at odds with the remedial goals underlying the ADA . . . . Courts must construe the language of the ADA

> broadly in order to effectively implement the ADA's fundamental purpose of 'provid[ing] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.' . . . . "[T]he ADA's broad language brings within its scope anything a public entity does."

Hason, 2002 D.J.D.A.R. 1737 at 1739 (citations omitted). This affirmation of the Title II's broad reach is relevant to appellees' argument that Title II cannot be read to reach the Board of Prison Terms.

Sincerely,
/s/ [Sara Norman]
Sara Norman
Attorney for Plaintiffs-appellees

cc: Deputy Attorney General Michael Williams (by fax and mail)

APPENDIX B

November 30, 2001

Cathy Catterson, Clerk
United States Court of Appeals
For the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939
BY FACSIMILE AND MAIL: 415-556-9721

RE: CHARLES W. THOMPSON, ET AL. v. GRAY DAVIS, et al.
Case No. 01-15091

Dear Ms. Catterson:

In response to Appellants' letter of November 28, 2001, bringing to this Court's attention the November 28, 2001 decision in *Armstrong v. Davis*, No. 01-15132 pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, Appellees offer their prompt response in accord with that rule. Appellees respectfully bring to this Court's attention contrary case references for consideration in rebuttal of Plaintiff's newly offered material.

Appellants raise the *Armstrong* decision's reference to *Board of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 121 S. Ct. 955 (2001), and the resulting holding that Congress' unconstitutional attempt at abrogating the states' sovereign immunity with regard to Title I of the ADA did not apply equally to Title II of that statute. Slip Opinion at 16105. Appellees previously preserved this issue, in contrast to the *Armstrong* defendants (Slip Opinion at 16104), but previously declined to brief the matter fully because Appellants lacked the opportunity to review *Garrett* prior to filing their opening brief. (Appellees' Brief at 17 n. 3.)

The matter having been newly raised in *Armstrong* and by Appellants, however, Appellees respectfully bring to this

Court's attention and may reference at oral argument the following cases:

Armstrong v. Davis, No. 01-15132 at Slip Opinion 16105: noting *Armstrong* Appellants' waiver of the sovereign immunity issue, specifically with the intent to respectfully request the opportunity to provide the supplemental briefing requested by this Court of the *Armstrong* defendant-appellants;

Board of Trustees of the Univ. of Alabama v. Garrett, 531 U.S. 356, 121 S. Ct. 955, 962-968 (2001): providing analytical model for evaluating the constitutionality of a congressional attempt to abrogate sovereign immunity;

Armstrong v. Wilson, 124 F.3d 1019, 1025 (9th Cir. 1997) (*Armstrong I*), *cert. denied*, 524 U.S. 937 (1998); *Clark v. California*, 123 F.3d 1267, 1270-1271 (9th Cir. 1997), *cert. denied sub nom.*, *Wilson v. Armstrong*, 524 U.S. 937 (1998); *Dare v. California*, 191 F.3d 1167, 1174-1175 (9th Cir. 1999), *cert. denied*, 121 S. Ct. 1187 (2001): addressing abrogation prior to the Supreme Court providing an analytical model for abrogation in *Garrett*; *Demshki v. Monteith*, 255 F.3d 986, 988-989 (9th Cir. 2001): holding abrogation invalid with regard to Title V of the ADA;

Hodgers-Durgen v. de la Vina, 199 F.3d 1037, 1045 (9th Cir. 1999): recognizing that courts exercise extreme caution before authorizing claims for injunctive relief against state criminal processes;

Lavia v. Pennsylvania Department of Corrections, 224 F.3d 190, 193-194 (3d Cir. 2000): addressing *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), where the Supreme Court held that the Age Discrimination in Employment Act was not a valid exercise of Congress' § 5 enforcement power, and recognizing the error of relying on the pre-*Kimel* decision in *Clark*; *Erickson v. Board of Governors of State Colleges and Universities for Northeastern Illinois Univ.*, 207 F.3d 945, 948, 952 (7th Cir. 2000): reversing pre-*Kimel* finding of constitutional

abrogation with regard to Title I and openly questioning abrogation of Title II;

Neiberger v. Hawkins, 150 F. Supp. 2d 1118, 1121-1124 (D. Colo 2001): recognizing split in Circuit Courts of Appeals with regard to Title II abrogation, concluding abrogation was invalid, and recognizing that pre-*Garrett* contrary decisions did not conform to the Supreme Court's analytical requirements for abrogation;

Patricia N. v. Lemahieu, 141 F. Supp. 2d 1243, 1250 (D. Haw. 2001): finding *Clark* and *Dare* controlling at this time, while recognizing "doubt on the long-term viability" of pre-*Garrett* Title II decisions;

Walker v. Snyder, 213 F.3d 344, 347 (7th Cir. 2000) (citations omitted), *cert. denied,* 121 S.Ct. 1188, and *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1004 (8th Cir.1999) (en banc), *cert. granted*, 120 S. Ct. 1003, *cert. dismissed*, 120 S. Ct. 1265 (2000): addressing inapplicability of the *Ex parte Young* exception for prospective injunctive relief under the ADA, in response to contrary *Garrett* dicta referenced in the *Armstrong* slip opinion concurrence at 16105.

While the unanticipated publication of this Court's *Armstrong* decision and Appellants' raising this issue pursuant to Rule 28(j) make a comprehensive list of supplemental case references impossible, Appellees offer these as a representative sampling of authority relevant to resolving this issue. Appellees will provide any additional case references promptly and pursuant to Rule 28(j) prior to this Court rendering any decision in this matter. Appellees thank this Court for its consideration of this matter

Sincerely,
/s/ [Michael J. Williams]
MICHAEL J. WILLIAMS
Deputy Attorney General

For BILL LOCKYER
Attorney General

cc: Sara Norman, Esq., Prison Law Office (by facsimile and mail)